

PRINCIPLES

OF THE

*BANKRUPT LAW.*



PRINCIPLES

BOOKS

228. i 25

PRINCIPLES  
OF THE  
*BANKRUPT LAW.*

BY

ARCHIBALD CULLEN, Esq:  
OF THE MIDDLE TEMPLE,  
BARRISTER AT LAW, AND A COMMISSIONER OF BANKRUPTS.

LONDON;

PRINTED BY A. STRAHAN,  
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,  
FOR T. CADELL AND W. DAVIES, STRAND.

1800.



TO

THE RIGHT HONOURABLE

ALEXANDER LORD LOUGHBOROUGH,

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

PERMIT me, My Lord, in humbly dedicating to your Lordship the following Work, to discharge what I conceive to be peculiarly my duty with respect to a subject which falls so immediately under your Lordship's particular jurisdiction; while at the same time I feel a great satisfaction in the opportunity it affords me, of expressing the grateful sense which I entertain of the friendship which your Lordship shewed for my Father when living, and of the regard you have testified for his memory since, in your Lordship's kindness to his family.

I have the honour to be,

My Lord,

with the utmost Respect,

Your Lordship's most obedient

and obliged humble Servant,

ARCHIBALD CULLEN.



THE FIRST PART OF THE HISTORY OF THE  
LIFE OF THE LATE LORD JOHN RUSSELL

BY  
JAMES ANSTON, ESQ.  
OF THE BARR

IN TWO VOLUMES.  
LONDON:  
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# TABLE OF CONTENTS.

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	PAGE
INTRODUCTION	I
BOOK I.	
<i>Of the Persons who may be Bankrupt</i>	7
Chap. I. Of the Person	8
II. Of the Trade	9
III. Of the Capacity of Contracting debts in trade	26
BOOK II.	
<i>Of the Acts which make a Person a Bankrupt</i>	29
Chap. I. Of acts of bankruptcy which relate to the Person of the trader	31
II. Of acts of bankruptcy which relate to dispositions of his Effects	41
III. Of acts of bankruptcy which relate to the Circumstances or Credit of the trader	58
IV. Of acts of bankruptcy, Generally	62
BOOK III.	
<i>Of the Commission, and Proceedings under it</i>	66
Chap. I. Of Suing out the commission	67
II. Of Opening the commission	77
a 4	III. Of

## TABLE OF CONTENTS.

	PAGE
III. Of the Proof of debts under the commission	82
IV. Of the appointment and choice of Assignees, and manner of making the Assignment	161
V. Of the Effect of the assignment	173
VI. Of the Examination of the bankrupt and others	323
VII. Of the Certificate	371
VIII. Of the Dividend, Allowance, and Surplus	403

### BOOK IV.

<i>Of Suits, and other Proceedings, at Law, and in Equity</i>	412
Chap. I. At Law	ibid.
II. In Equity	431
III. Of Superfeding and Renewing commissions	440
IV. Of Costs	446

### BOOK V.

<i>Of Commissions against Partners</i>	451
Chap. I. Of Taking out, Opening, &c. the commission	ibid.
II. Effect of the assignment	455
III. Proof of debts	459
IV. Of the Certificate, and the bankrupt's Allowance	474
V. Of Actions by and against Assignees	476

## TABLE OF CASES.

### A

**A** BBOT and Plumbe, 422  
 Avery and Williams, 435  
 Abingdon, *exp.* 460  
 Adams, *exp.* 379  
 Adney, *exp.* 127  
 Alderfon and Temple, 256. 279,  
     280, 281  
 Aldridge and Ireland, 33  
 Alexander and Vaughan, 24  
 Allan and Hartley, 63. 452, 453  
 Allen, *exp.* 98. 376. 450  
 Alsop and Brown, 387  
 Alsop and Price, 128. 399  
 Ambrose and Clendon, 73. 75. 424  
 Andrews, *exp.* 212  
 Andrews and Spicer, 235. 412  
 Angerstein, *exp.* 462  
 Anon. 74. 101. 120, 123, 124. 192.  
     314. 325. 378. 391. 417. 437.  
     439; 455  
 L'Apostre and Le Plaistrier, 311.  
     315  
 Apsey, *exp.* 463  
 D'Aquila and Lambert, 260  
 Arding and Flower, Addenda  
 Arkley, *exp.* 148  
 Ashbrook and Manby, 190  
 Ashdown and Fisher, 401  
 Ashley and Kell, 272  
 Atkin and Barwick, 257  
 Atkinson and others, *exp.* 156  
 Atkinson and Elliot, 199. 200

Atkinson and Malling, 305  
 Attorney General and Senior, 251  
 Audley and Halsey, 243, 253  
 Austin and Whithead, 251  
 Aylett and Hartford, 105, 151

### B

Bachurst and Clinkard, 455  
 Badger, *exp.* 118  
 Bailey, *exp.* 120  
 Bailey and Dillon, 388  
 Ballantine and Golding, 397  
 Bamford and Baron, 63. 299  
 Banks, *exp.* 460. 467  
 Bannister and Scot, 111  
 Barnard and Vaughan, 34  
 Barnes and Freeland, 259  
 Barrow and Forster, 36  
 Barrow, *exp.* 67. 440  
 Bartholomew and Sherwood, 23  
 Barton, *exp.* 39  
 Barwell and Ward, 95  
 Barwick and Read, 180.  
 Bate *exp.* 475  
 Bate and Henckell, *in re*, 467  
 Bateman's case, 284  
 Bateman and Bailey, 426  
 Batler, *exp.* 179  
 Batson, *exp.* 305. 469  
 Baudier, *exp.* 455. 460, 461. 464  
 Beardmore and Cruttenden, 135.  
     156

Beally



# TABLE OF CASES.

Beasly and Beasly, 453  
 Beaufoy, *exp.* 133  
 Beck and Welsh, 187  
 Beddom and Holbrok, 401  
 Belchier, *exp.* 165  
 Belton, *exp.* 93. 144  
 Bennet, *exp.* 104. 118. 121  
 Bennet and Davies, 219, 220  
 Benson and Flower, 177  
 Bent and Puller, 213. 228  
 Besford and Saunders, 388  
 Biekerdicke and Bollman, 75  
 Bibbins and Mantell, 429  
 Billon and Hyde, 201  
 Bingley and Maddison, 74  
 Bird and Major, 19  
 Bird and Sedgwick, 24  
 Bird and Jones, 95  
 Birkett and Jenkins, 260  
 Bishop and Church, 204  
 Biffon, *exp.* 152  
 Bize and Dickson, 203  
 Blackhall and Combs, 106  
 Blake, *exp.* 469  
 Bland, *exp.* 336  
 Blandford and Foote, 106  
 Bloxham, *exp.* 159  
 Boden and Dellow, 437  
 Boehm and Stirling, 100  
 Bolton and Puller, 455  
 Botterill, *exp.* 149  
 Bosville and Brander, 217. 215  
 Bond and Hill, *exp.* 460, 467  
 Bould, *exp.* 344  
 Bourdillon and Dalton, 191  
 Bourne and Dodson, 293  
 Bouteflower and Coats, 103  
 Bowes, *exp.* 19. 58  
 Bowles and Langworthy, 422  
 Bracy's case, 333. 365, 366.  
 427  
 Bradford and Bloodworth, 40.  
 241  
 Bradley and Clarke, 237  
 Bradshaw and Ross, 247  
 Bramley and Munde, 36. 63  
 Brasseley and Dawson, 250

Bristow and Eastman, 166  
 Bristow's case, 179  
 Bromley and Child, 109. 119  
 Bromley and Goodere, 118, 119.  
 410  
 Brooks and Lloyd, 127  
 Brook and Hewitt, 177  
 Brookes and Rogers, 98. 132  
 Brown, *exp.* 136. 386. 442. 452.  
 462  
 Brown and Jones, 217. 220. 284  
 Brown and Heathcote, 190. 255.  
 293. 295, 296. 305  
 Brown and Bullen, 407  
 Brown and Chapman, 414  
 Brown and Davies, 100  
 Brymer, *exp.* 98  
 Bryson and Wyllie, 302. 316  
 Bucknall and Royston, 292. 300  
 Buckner, *exp.* 374  
 Buckley and Taylor, 125  
 Burchall, *exp.* 12. 70  
 Burchall's case, 70  
 Burdett and Willett, 222  
 Burdon and Dean, 217. 219  
 Burnaby's case, 70. 440  
 Burnaby, *exp.* 460. 464. 470  
 Burrell, *exp.* 468  
 Burrow, *exp.* 93  
 Burton, *exp.* 387. 397  
 Buscall and Hogg, 23  
 Bush, *exp.* 209. 213. 232  
 Butcher and East, 47. 72  
 Butler, *exp.* 170  
 Butler and Baker's case, 256  
 Butler and Cooke, 424  
 Byas, *exp.* 190.

## C

Calcot, *exp.* 409  
 Calcroft and Swan, 401, 402  
 Calvert and Lingard, 235  
 Callow, *exp.* 150. 154. 433  
 Callowell and Clutterbuck, 85  
 Callen

# TABLE OF CASES.

- Callen and Meyrick, 401, 402  
 Came and Coleman, 59  
 Cann and Read, 166  
 Cantrell and Graham, 392  
 Capot, *exp.* 150  
 Cary and Crisp, 230. 412  
 Carington, *exp.* 27. 443  
 Caruthers, *exp.* 474  
 Caswell, *exp.* 120  
 Cator, *exp.* 91. 152  
 Cathcart and Blackwood, 180. 185.  
 384  
 Caw, *exp.* 155  
 Cawley and Hopkins, 63  
 Champion, *exp.* 118. 411  
 Chapman and Gardner, 426  
 Chapman and Tanner, 187  
 Charlton and King, 109. 400  
 Le Chevalier and Lynch, 146.  
 249  
 Child, *exp.* 143  
 Chilton and Whiffin, 131  
 Chippendale and Tomlinson, 273.  
 414, 415  
 Christie and Straiton, 398  
 Clanricarde, *exp.* 133  
 Clare, *exp.* 260  
 Clarke, *exp.* 98. 446  
 Clarke and Ryall, 61. 421  
 Clarke and Capron, 434  
 Clavey and Hayley, 42  
 Cleve and Mills, 245  
 Clowes, *exp.* 462, 467  
 Cobham, *exp.* 455. 464  
 Cock and Goodfellow, 53, 54. 283  
 Cockerell and Owston, 390. 103  
 Cockran and Love, 74  
 Cockshot, *exp.* 55. 137  
 Cohen and Cunningham, 70  
 Cole and Davies, 65  
 Colkett and Freeman, 36, 37. 64  
 Collet and De Golls, 435  
 Collins and Forbes, 302. 316, 317.  
 322.  
 Colls and Lovell, 388  
 Comb's ca. 441  
 Le Compte, *exp.* 93  
 Compton and Collinson, 27  
 Compton and Bedford, 48  
 Congalton, *exp.* 238  
 Cook, *exp.* 452. 455. 460  
 Cooper's case, 374  
 Cooper and Chitty, 419  
 Cooper and Pepys, 96. 165. 404  
 Copeman and Gallant, 223. 292.  
 312. 315  
 Copland and Stein, 209. 213. 232  
 Coppendale and Bridgen, 60, 61.  
 243. 421  
 Corbett and Poilintz, 27  
 Cotterell, *exp.* 90  
 Cotterell and Hooke, 94  
 Cowley and Dunlop, 99. 133  
 Cox and Liotard, 116  
 Coyssegame, *exp.* 217  
 Craven and Knight, 460. 464  
 Crinsoy, *exp.* 149  
 Crispe, *exp.* 442. 454  
 Crispe and Perritt, 454  
 Crisp and Pott, 20. 55. 283  
 Crookshank and Thomson, 137  
 Cross and Fox, 426  
 Crossley, *exp.* 97  
 Crossley's Case, 119  
 Crowder, *exp.* 460, 461  
 Croxton and Hodges, 65  
 Crusoe and Bugby, 182  
 Curtis, *exp.* 134  
 Cust, *exp.* 469  
  
 D  
 Darby and Baughan, 349. 356  
 Darby and Smith, 320  
 Davis and Bowsher, 213  
 Davis and Trotter, 346  
 Davison and Butler, 438  
 Daw and Holdsworth, 73  
 Deckes and Strutt, 217  
 Deeze, *exp.* 213  
 Denham's case, 71  
 Descharmes,

## TABLE OF CASES.

Descharmes, *exp.* 123  
 Devismes, *exp.* 123. 124  
 Devon and Watts, 52  
 Dicke, *exp.* 349  
 Dickinson and Foord, 35  
 Dickson and Evans, 195. 206  
 Dillon, *exp.* 124  
 Dobson, *exp.* 114  
 Dobson and Lockhart, 200  
 Dodsworth and Anderson, 24  
 Dommet and Bedford, 182  
 Donnelly and Dan, 401  
 Dorvilliers, *exp.* 150  
 Downam and Matthews, 195  
 Downton and Cross, 426  
 Drake, *exp.* 469  
 Drake and Mayor of Exeter, 175  
 Drinkwater and Goodwin, 213,  
     214  
 Drury and Mann, 169  
 Dumas, *exp.* 223, 224. 226  
 Duncombe and Walter, 59  
 Dunlop's case, 248  
 Dupaz, *exp.* 155  
 Dyer and Missing, 357. 360

### E

Eade and Lingwood, 437  
 E. I. Co. *exp.* 86  
 Eckhart and Wilson, 414. 453.  
     477  
 Eddie and Davidson, 456  
 Edwards and Applebee, 188  
 Ellam and Leigh, 27  
 Elliot and Danby, 169  
 Ellis, *exp.* 222  
 Ellis and Hunt, 268. 270  
 Eggletham and Haines, 423  
 Elton, *exp.* 460. 465  
 English, *exp.* 53. 144  
 Escot and Milward, 224  
 Evans and Mann, 272. 418. 422  
 Evans and Brown, 274. 414  
 Evans and Gill, 401

Evans and Gould, 424, 425  
 Eyre and Birbeck, 63

### F

Falkner and Case, 232. 307, 308  
 Fairholme and others, 247  
 Fashion and Dormet, 417  
 Le Febre, *exp.* 96  
 Field and Bellamy, 63  
 Field and Curtis, 425  
 Field and —, 456  
 Flarty and Odium, 180, 181  
 Fletcher and Bathurst, 94  
 Flintum, *exp.* 464  
 Flower and Herbert, 71. 413. 426  
 Flyn, *exp.* 295, 297, 298  
 Foord, *exp.* 48. 50  
 Foster and Allanson, 235  
 Fowler and Brown, 76  
 Fowler and Down, 274. 414, 415.  
     476  
 Fowler and Padget, 32, 33  
 Fox and Hanbury, 456. 458. 477  
 Francis and Rucker, 102  
 Frank, *exp.* 260  
 Franklyn and Fern, 434, 435.  
 Freeman and Pasley, 217  
 Freeman and Grace, *in re*, 467  
 French and Fenn, 199  
 De Fries, *exp.* 346  
 Fryer and Flood, 283. 285  
 Fyde, *exp.* 379.

### G

Galbreath and Galbreath, 398  
 Gardiner and Walker, 218  
 Garratt and Cullum, 223  
 Garratt and Moule, 35  
 Gayer and Wilkinson, 216  
 Gayter, *exp.* 413  
 Gedge, *exp.* 57  
 George and Claggett, 206  
 Gibbons,



# TABLE OF CASES.

Gibbons, *exp.* 349  
 Gibson and H. B. Company, 204  
 Gill and Scrivens, 396  
 Gillespie and Coutts, 306  
 Glaister and Hewer, 75. 99  
 Goddard and Vanderheyden, 129  
 Godfrey and Furzo, 223  
 Godling and Godling, 85  
 De Golls and Ward, 73. 436  
 Goodin and L. Aff. Comp. 212.  
     214  
 Goodtitle and North, 112.  
 Goodwin, *exp.* 72. 448  
 Gordon and E. J. Co. 288. 307,  
     308, 309. 314  
 Gordon and Wilkinfon. See Addenda  
 Goring and Warner, 181  
 Goring, *exp.* 405  
 Goss and Dufresnay, 460. 464  
 Grace and Higham, 474  
 Graham and Benton, 106  
 Graham, *exp.* 367  
 Graham and Robertson, 476  
 Gray and Fielder, 417  
 Green, *exp.* 393  
 Green and Farmer, 210  
 Gregnier, *exp.* 167  
 Gregory's case, 326  
 Grey, *exp.* 344. 369  
 Grey and Kentish, 215. 217  
 Gray and Mendez, 190  
 Grier, *exp.* 408  
 Grill, *exp.* 469  
 Groenvelt and Burwell, 355  
 Grove, *exp.* 123, 124, 125  
 Grove and Dubois, 198. 203  
 Groom, *exp.* 120. 197  
 Groom and Potts, 408  
 Gulliver and Drinkwater, 112  
 Gullston's case, 32, 33  
 Gullston, *exp.* 444. 449

## H

Hague and Rolleston, 457  
 Hale, *exp.* 206

Hall, *exp.* 36  
 Hall and Gurney, 305, 306  
 Hammond and Myers, 437  
 Hammond and Toulmin, 111  
 Hamson and Harrison, 11  
 Hancock and Entwistle, 108. 197  
 Hancock and Haywood, 476  
 Hankey, *exp.* 108. 411  
 Hankey and Jones, 10. 18. 28  
 Hankey and Garratt, 470  
 Hankey and Smith, 205  
 Hankey and Towgood, 22  
 Hankey and Vernon, 158. 236  
 Harman and Fisher, 256. 258. 279.  
     280, 281  
 Harman and Spottiswoode, 42. 280  
 Harrison and Walker, 190  
 Harrison, *exp.* 15. 23. 128  
 Harvey and Williams, 412  
 Haselington and Gill, 319  
 Hassel and Simpson, 47  
 Haswell and Hunt, 259  
 Havard, *exp.* 118  
 Haviland and Cooke, 396  
 Hawkes and Saunders, 35  
 Hawkins and Penfold, 238  
 Haydon and Haydon, 455  
 Hayward, *exp.* 460. 464. 470  
 Hearle and Greenbank, 219  
 Heath and Percival, 473  
 Henbest and Brown, 74  
 Henderson, *exp.* 453  
 Hercy, *exp.* 118  
 Heskuyson and Woodbridge, 131  
 Hewitt, *exp.* 152  
 Hewitt and Mantell, 428, 429  
 Heylor and Hall, 63. 71  
 Hicklin, *exp.* 152  
 Higden and Williamson, 178. 215  
 Highmore and Malloy, 12  
 Hiklin, *exp.* 152  
 Hill, *exp.* 121  
 Hill and Reeves, 415  
 Hill and Sish, 59  
 Hilliard's ca. 405  
 Hillier, *exp.* 147  
 Hinchefman's ca. 350

Hitchcock



## TABLE OF CASES.

Hitchcock and Sedgewicke, 235  
 Hitchin and Campbell, 419  
 Hockley and Merry, 128  
 Hodgson, *exp.* 464  
 Hodgson and Bell, 133. 135. 137  
 Hodgson and Loy, 267. 455  
 Holden, *exp.* 100  
 Holland and Culliford, 217  
 Holland and Palmer 382. 383  
 Holliday, *exp.* 433  
 Hollingshead's ca. 366  
 Hollingworth and Took, 223. 270  
 Holmes and Walsh, 370  
 Holmes and Winnington, 235  
 Hooper and Smith, 56. 63  
 Hopkins and Dewar, 273  
 Hopkins and Ellis, 64  
 Hopkins and Grey, 65  
 Hopkinson, *exp.* 155  
 Horsey's ca. 460, 461  
 Horsey, *exp.* 155  
 Howard and Jemmett, 115. 221  
 Howard and Poole, 45. 474  
 Howell, *exp.* 147  
 Howis and Wiggins, 98. 132  
 Hunt and Ward, 270  
 Hunter, *exp.* 452. 460. 468  
 Hunter and Beale, 269  
 Hunter and Potts, 245  
 Hurst and Mead, 105  
 Hufsey and Fiddall, 418  
 Hyde and Price, 27  
 Hylliard, *exp.* 59. 70. 440.

### I

Jackman and Nightingale, 36  
 Jackson, *exp.* 462  
 Jacky and Butler, 455  
 Jacob and Shepherd, 54  
 Jacobson and Williams, 178. 216,  
     217  
 James, *exp.* 74. 155. 325. 335.  
     366  
 Janson and Wilson, 428  
 Jaquez, *exp.* 123

Jarman and Woolloton, 319. 321  
 Jeakil's ca. 332  
 Jeffries, *exp.* 120  
 Jeffries and Williams, 252  
 Jeffs and Bullard, 396  
 Jewson and Moulson, 216, 217  
 Inglis and Grant, 62  
 Johnson, *exp.* 379  
 Johnson and Spiller, 110. 112, 113  
 Jollet and Depouthieu, 246  
 Jolliffe and Horne, 241  
 Jones and Barkley, 383  
 Jones and Roe, 179  
 Joynes, *exp.* 170. 180  
 Jourdain and Le Fefre, 213

### K

Kaye and Bolton, 338  
 Kennet and Greenwallers, 425  
 Kenyon and Solomon, 345, 346  
 Kerney, *exp.* 358  
 Kettlear and Raynes, 131  
 Kettle and Hammond, 50  
 Kinder and Williams, 356  
 King, *exp.* 97. 120. 189. 442  
 King and Egginton, 92. 221. 415  
 King and Lacy, 189  
 King and Leith, 236. 418  
 King and Crump, 250  
 King and Man, 250  
 King and Fowler, 251  
 King and Pixley, 252. 391  
 King and Martin, 436  
 Kinlock and Craig, 213. 267. 270  
 Kirk and Paulin, 219  
 Kirkman and Shawcross, 212  
 Koops, *exp.* 155  
 Kretchman and Breyer, 428  
 Kruger and Wilcox, 212. 214

### L

Lane, *exp.* 405  
 Lanesborough and Jones, 195, 196  
     472

Langhorne's

# TABLE OF CASES.

Langhorne's case, 362  
 Langston and Boylston, 236  
 Lavin and Philips, 27. 216  
 Law and Skinner, 48, 49  
 Leaverland, *exp.* 443  
 Lee, *exp.* 69, 70. 97. 134. 209.  
     232. 462  
 Leeke, *exp.* 143  
 Leigh and Monteiro, 399.  
 Leitch, *exp.* 103  
 Lempriere and Pasley, 190. 254.  
 Levi, *exp.* 36.  
 Lewes, *exp.* 154  
 Lewis and Piercy, 106. 385  
 Lewis and Chafe, 381  
 Lickbarrow and Mafon, 261  
 Lidderdale and D. Montrose, 180  
 Like and Beresford, 217  
 Lilly and Osborne, 55, 283  
 Lindsey, *exp.* 150  
 Lingham and Biggs, 295, 296. 302.  
     320, 321  
 Lingood, *exp.* 71. 341. 359. 443  
 Lingood and Eade, 33  
 Linton and Bartlett, 51  
 Lister and Mundell, 402  
 Litchfield, Earl of, 165  
 Llewellyn, *exp.* 114  
 Lock and Bennet, 195  
 Lock and Bromley, 450  
 Lockyer and Savage, 183, 220  
 Lodge and Fendall, *exp.* affects. of,  
     469  
 Long, *exp.* 406  
 Longford and Ellis, 105. 112  
 Lord, *exp.* 444  
 Lowfield's case, 179  
 Lowfield and Bencroft, 426  
 Lucas and Marsh, 205  
 Ludlow and Browning, 221  
 Lydiard, *exp.* 470  
 Lyons, *exp.* 180

## M

Macarty and Barrow, 98  
 Macauley and Phellips, 217

Mace and Caddell, 311. 315. 316.  
     320  
 Macklin, 104  
 Mackerness, *exp.* 74  
 Mackenfon and Parker, 460.  
     464  
 M'Master and Kell, 416  
 Man and Sheperd, 69  
 Manton and Moore, 54. 304  
 Marlin, *exp.* 471  
 Marlar, *exp.* 69. 97. 117  
 Marlow and Forbes, 350  
 Marsh and Chambers, 100. 205  
 Marshall, *exp.* 97. 132. 158  
 Marshall and Yeaman, 398  
 Marsh, *exp.* 221. 311. 315  
 Martin and Pewtress, 191. 280  
 Martin and Court, 133. 136  
 Martin and O'Hara, 386. 391  
 Martin and Norfolk, 448  
 Mafon and Lickbarrow, 262  
 Master and Winter, 72  
 Master and Drayton, 425  
 Mather, *exp.* 90  
 Mathews, *exp.* 149. 305  
 Mawdesly and Parke, 245  
 Maydwell, *exp.* 133  
 Mayhoe and Archer, 23  
 Maylin and Eylo, 34  
 Mayor and Steward, 108. 393  
 Mear, *exp.* 26. 441  
 Medlicot's case, 70. 440  
 Meggott and Mills, 63. 73. 90  
 Megliorucchi and R. E. Aff. Com-  
     pany, 203  
 Menham and Edmonston, 420.  
     441  
 Meymot, *exp.* 24. 28. 222. 335  
 Mildmay, *exp.* 415  
 Miles and Williams, 115. 215.  
     216  
 Millar's case, 363. 365, 366  
 Miller and Seare, 356, 357. 366  
 Mills, *exp.* 118. 410, 411  
 Mills and Auriol, 393  
 Mills and Hughes, 14  
 Mitchell, *exp.* 120

## TABLE OF CASES.

Mitchell and Cockburn, 462  
 Mitford, *exp.* 122  
 Moises and Little, 175  
 Moggridge, *exp.* 89  
 Monk and Morris, 430  
 Morgan and Green, 417  
 Morris, *exp.* 411  
 Moth and Frome, 179  
 Moore, *exp.* 417.  
 Muggeridge, *exp.* 143  
 Murray, *exp.* 324

### N

Naish and Tatlock, 191  
 Nathan's case, 364. 366  
 Neale and Cottingham, 247  
 Nerot and Wallace, 336  
 Newland and — 242  
 Newton, *exp.* 166. 171  
 Newton and Newton, 14  
 Newton and Trigg, 20  
 Nockold, *exp.* 407  
 Nowlan, *exp.* 364  
 Nutt, *exp.* 22. 443

### O

Ockenden, *exp.* 210  
 Ogilvie and creditors of Aberdeen, 248  
 Oldknow, *exp.* 464  
 Oliver and Ames, 415  
 Orlebar and Duke of Kent, 187  
 Orlebar and Fletcher, 242  
 Oswell and Probert, 217, 218  
 Ourfell, *exp.* 226. 228  
 Ouston and O'Bryan, 448. 450  
 Oxlade and Perchard, 426

### P

Page, *exp.* 464  
 Pain and Teap, 240

Parker, *exp.* 340. 350. 468. 471  
 Parker and Wells, 4. 10. 14, 15  
 Parker and Bleeke, 169  
 Parker and Carter, 213  
 Parker and Norton, 112, 113  
 Parker and Manning, 417. 423  
 Parsons, *exp.* 327. 336  
 Pate and Brandon, 177  
 Patman and Vaughan, 23  
 Pattison and Banks, 90. 94  
 Paul and Jones, 130  
 Peachy, *exp.* 140  
 Pedley's case, 361. 363  
 Penriz and Dainty, 63  
 Perkin and Proctor, 412  
 Perkins and Kempland, 93  
 Perrot's case, 342, 343. 361  
 Perrot and Ballard, 362  
 Perry and Bowes, 169  
 Peters and Soam, 189  
 Philips and Brown, 105  
 Philips and Smith, 156  
 Philips and Thomson, 242  
 Philips and Hunter, 245  
 Philips and Sheriff of Essex, 33,  
 34  
 Philpot and Hoare, 182  
 Philpot and Corden, 395  
 Pinkerton and Marshall, 237  
 Plummer, *exp.* 124  
 Plummer and Lea, 430  
 Pope and Crasshaw, 217  
 Pope and Onslow, 188  
 Port and Turton, 14. 17  
 Powells, *exp.* 460, 461  
 Prescott, *exp.* 198  
 Preston, *exp.* 27, 28  
 Priddle and Thomas, 430  
 Primrose and Bromley, 167  
 Prin and Beale, 235  
 Pringle and Hodgson, 215, 216  
 Prior and Hill, 217, 218  
 Proudfoot, *exp.* 386. 442. 452  
 Puleston, *exp.* 441. 449  
 Pye and Daubuz, 188  
 Pym and Benson, 235

Quantock



# TABLE OF CASES.

## Q

Quantock and England, 76  
Queen and Arnold, 249, 285  
Quin and Keeffe, 397. 400  
Quintip, *exp.* 472

## R

R. and Jackson, 367  
R. and Nathan, 326  
Raikes and Poreau, 32  
Ray and Hufsey, 391  
Rattray, *exp.* 439  
Read and Vaughan, 418  
Read and Ward, 239, 240  
Richardson and Bradshaw, 10  
Richardson, *exp.* 385  
Richardson and Goodwin, 456.  
464  
Ridout and Brough, 195. 205  
Rig and Wilmer, 417  
Riley, *exp.* 194  
Ring, *exp.* 469  
Roberts, *exp.* 101  
Roberts and Teasdale, 63  
Robertson, *exp.* 155  
Robinson and Taylor, 178. 215  
Robson and Calze, 382, 383  
La Roche and Wakeman, 275  
Rockhead and Scott, 398  
Rodgers, *exp.* 344. 369  
Roe and Galliers, 182, 183  
Rogers, *exp.* 155  
Rolfe and Caslon, 133  
Rose and Green, 40. 59, 60  
Round and Hope Hyde, 36. 52  
Row and Dawson, 189  
Rowlandson, *exp.* 460. 467  
Rugle's case, 403  
Russell and Russell, 187. 425  
Rust and Cooper, 44. 280  
Ryall and Rolle, 176, 196, 197. 292,  
293. 296. 298, 299, 300. 304,  
305. 307, 308, 309. 311, 312,  
313. 315, 316.

Ryall and Larkin, 194, 195  
Ryder and Fowle, 38  
Ryfwicke, *exp.* 96. 156

## S

Salomons and Nissen, 266  
Salte and Field, 258  
Sandby, *exp.* 95  
Satinderfon and Rowles, 21  
Saufmerez, *exp.* 374. 378. 385  
Schelinger and Blackerby, 181  
Scott and Surman, 223  
Scriven and Tapley, 217. 219  
Studamore, *exp.* 280, 281  
Seddon, *exp.* 98; 99  
Sellas and Dawson, 438  
Scrimshire and Alderton, 224  
Setcole and Healy, 439  
Shakeshaft, *exp.* 138. 144  
Shakeshaft, John, *exp.* 144  
Shank, *exp.* 211. 214  
Sharpe and Gamon, 435  
Shaw, *exp.* 450  
Shuttleworth, *exp.* 101  
Shuttleworth and Bravo, 424  
Sidebotham, *exp.* 155. 441  
Sill and Worfwick, 146. 245,  
246  
Silk and Osborn, 274. 414  
Simson, *exp.* 105  
Simsons, *exp.* 142. 452  
Skip, *exp.* 89  
Slack, *exp.* 450  
Slipper and Stidstone, 472  
Small and Audley, 54, 55  
Smith, *exp.* 62. 101. 121. 146,  
147, 159. 344. 472.  
Smith and Blackman, 68  
— and Bromhead, 413  
— and Bromley, 384  
— and Coffin, 171. 176  
— and Gells, 138  
— and Hodson, 202. 418  
— and Jameson, 463  
— and Jamieson, 166  
— and Mills, 419

b

Smith

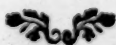


## TABLE OF CASES.

- Smith and Payne, 52  
 — and Pickering, 255  
 — and De Silva, 458  
 — and Stracy, 61  
 Smithson and Johnson, 129  
 Sneaps, *exp.* 107  
 Snee and Prescott, 260. 267  
 Solomons and Ross, 246  
 South S. C. and Wymondsell, 190  
 Southcote and Brothwaite, 391  
 Sowley and Jones, 402  
 Spencer and Vanacre, 241  
 Staines and Planck, 85. 130  
 Standgroom, *exp.* 305, 306  
 Stapley, *exp.* 72  
 Stevens and Sole, 293. 305  
 Stewart and Richman, 423  
 Stiles, *exp.* 140  
 Stiles and Pickart, *exp.* 406. 408  
 Stokes and Lariviere, 268  
 Stone and Grubham, 55. 289. 300  
 Stone and Lidderdale, 180  
 Stowe, *exp.* 356. 358  
 Stracy and Hulfe, 251  
 Streatfield and Halliday, 476  
 Stringfellow's case, 249  
 Summer and Brady, 382  
 Swain and De Mattos, 90  
 Swayne and Wallinger, 76  
 Sydebotham, *exp.* 26. 41
- T
- Taylor and Mills, 129  
 Taylor and Wheeler, 187  
 Thomas, *exp.* 74  
 Thomson, *exp.* 57. 89  
 Thomson and Freeman, 281  
 Thomson and Council, 233  
 Thornton and Dallas, 394  
 Thorp, *exp.* 449  
 Tibner, *exp.* 79  
 Timbrell and Mills, 420  
 Titner, *exp.* 457  
 Todd, *exp.* 104  
 Toms and Mytton, 73  
 Took and Hollingworth, 224. 228
- Touissant and Martinant, 133. 134.  
 136  
 Towle and Rand, 188  
 Trap, *exp.* 409  
 Treves and Townshend, 404, 405.  
 406  
 Tribe and Webber, 59  
 Troughton and Gitley, 275  
 Trueman and Fenton, 387  
 Tucker and Colh, 284  
 Tudway and Bourn, 276. 376  
 Tully and Sparks, 120  
 Turner, *exp.* 157. 351. 455  
 Twiss and Masly, 460. 474  
 Twyne's case, 44  
 Tyrell and Hope, 219, 220
- U
- Unwin and Oliver, 54  
 Utterton and Vernon, 87. 109.  
 113  
 Utterton and Mair, 436
- V
- Valentine and Vaughan, 21  
 Vandenhanker and Desborough,  
 219  
 Vanderheyden and De Paiba, 131  
 Vaughan, *exp.* 452  
 Vaughan and Martin, 427  
 Vernon and Hankey, 32. 202. 209.  
 232. 234. 236. 420  
 Vernon and Hall, 237  
 Vernon and Hanson, 419  
 Vincent and Brady, 402  
 Vincent, *exp.* 446  
 Voguel, *exp.* 464
- W
- Wadham and Marlow, 393  
 Wainman, *exp.* 73  
 Walcott

## TABLE OF CASES.

- |   |  |
|---|--|
| <p> Walcott and Hall, 85. 115. 144<br/> Walker, <i>exp.</i> 136. 260<br/> Walker and Birch, 214<br/> Walker and Burrows, 49. 54. 282, 283<br/> Walker and Giblett, 390<br/> Walker and Burnell, 287. 316. 320. 322, 323<br/> Wallace, <i>exp.</i> 158, 159<br/> Walter and Sherlock, 107. 112<br/> Ward, <i>exp.</i> 150. 154<br/> Ward and Turner, 304<br/> Wardell, <i>exp.</i> 118<br/> Warder, <i>exp.</i> 152<br/> Waring and Knight, 245<br/> Warrington and Norton, 81<br/> Watkinson and Barnardiston, 211<br/> Watts and Hart, 105, 106<br/> Waugh and Austen, 429<br/> Webb and Fox, 274. 414, 415. 477<br/> West and Skip, 295. 297. 312. 322. 456<br/> Wheatly, <i>exp.</i> 463<br/> Whitacre and Paulin, 241<br/> Whitchurch, <i>exp.</i> 165. 447<br/> Whitecomb and Jacob, 223, 224<br/> White, <i>exp.</i> 151. 344. 370. 406. 407<br/> Whitehead and Vaughan, 198. 213, 214<br/> Whitelock's Case, 26<br/> Whitter, <i>exp.</i> 101.<br/> Whitwell and Thomson, 42<br/> Wickes and Strahan, 474<br/> Wildman, <i>exp.</i> 96. 103<br/> Wilker and Bodington, 435<br/> Wilkins and Carmichael, 211<br/> Wilkins and Casey, 235. 238. </p> | <p> Wilkinson, <i>exp.</i> 260<br/> Willan and Giordani, 400<br/> Willet and Chambers, 12<br/> Williams and Dyde, 387<br/> Williamson, <i>exp.</i> 114. 149. 375. 376. 378<br/> Williams and Kinder, 439<br/> Wilson, <i>exp.</i> 12. 25. 154. 433<br/> Wilson and Bradshaw, 443<br/> Wilson and Creighton, 203<br/> Wilson and Day, 46<br/> Wilson and Norman, 35<br/> Wilson and Poulter, 418. 427<br/> Wilson's Case, 247, 248<br/> Winch and Keeley, 189<br/> Winchester, <i>exp.</i> 121<br/> Winter and Kretchman, 417<br/> Wiseman and Vandeput, 260. 267<br/> Wood, <i>exp.</i> 369, 370<br/> Woodier's Case, 32, 33<br/> Woolley and Cobbe, 390<br/> Worrall and Marlar, 217<br/> Worsley and Demattos, 46<br/> Wright, <i>exp.</i> 432. 449<br/> Wylie and Wilkes, 93 </p> <p style="text-align: center;">Y</p> <p> Yale, <i>exp.</i> 474<br/> Yarker and Botham, 447<br/> Yeates and Groves, 254, 280, 281<br/> Young and Hockley, 131<br/> Young, <i>exp.</i> 141 </p> <p style="text-align: center;">Z</p> <p> Zinck and Walker, 227 </p> |
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# INTRODUCTION

## PRINCIPLES

OF THE

## BANKRUPT LAW.

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### INTRODUCTION.

**T**HE law relative to bankrupts is entirely an innovation on the common law, first introduced by the statute of the 34 and 35 of *H. 8.* but since totally altered and new modelled by subsequent statutes, upon which the whole system is at present founded.

In the ordinary course of law, creditors may seize either the person, or the effects of their debtor, but they cannot take both at the same time; and if they take the body in execution, they cannot afterwards resort to the effects. All the creditors

B

must



## INTRODUCTION.

must run through all the same process to recover their several debts; there is no participation of the expence or benefit of one with those of another, or for the common advantage of the whole; but whatever effects each obtains possession of, he obtains for his own benefit exclusive of the rest, and his execution vests in himself no interest in any thing but in what he actually seizes. No provision is made on behalf either of any one creditor, or of all the creditors generally, for examining the debtor or other persons, to obtain or to compel a discovery of his effects in order to have them applied in satisfaction of his debts; nor on behalf of the debtor, for his release or discharge upon condition of surrendering all his property, or when, the whole having been actually seized by his creditors, there is no possibility of obtaining any further satisfaction. On the one hand, the imprisonment is not always effectual to force payment from an obstinate and fraudulent debtor; while, on the other, he whose insolvency may have arisen only from accident and misfortune, may still be detained in prison by a rigorous creditor, though he has nothing left wherewith to satisfy the debt.

By the bankrupt law, on the contrary, a form of proceeding, upon principles equally rational and humane, is allowed at the suit of one or more  
of

## INTRODUCTION.

of a man's creditors, at the common expence and for the common benefit of them all. The debtor is at once, by operation of law, divested of all his property real and personal, which is transferred to trustees chosen by his creditors. Large powers are given of enquiry and examination of persons, of seizure and recovery of effects; and the debtor himself is required under the highest penalty to discover and deliver up all his property of every kind whatsoever, the whole of which is afterwards divided amongst all his creditors equally, and in proportion to their several debts. And on the other hand, if the debtor makes a full discovery, and appears to have acted without fraud, he then becomes intitled to a complete discharge both of his person and of any effects he may afterwards acquire, and also to a reasonable allowance out of his former effects, proportioned to his good conduct and the amount of the dividend which his estate pays to his creditors.

The advantages, however, of this system of law are confined exclusively to traders, and the creditors of traders: a restriction, which, upon the slightest attention to the statutes, appears plainly to be founded, partly upon the circumstance of traders having greater opportunities than other persons of committing frauds upon their creditors, partly upon that of the greater and more sudden

## INTRODUCTION.

variations in the state and condition of their property, to which traders, even without fraud, are peculiarly exposed. The earlier statutes seem only to have had in view, the prevention of the frauds of the trader, and the relief of the creditor; the later have, with these objects, combined that also of the relief of the unfortunate and honest debtor.

Those opportunities of fraud, and that instability of fortune, which distinguish the case of persons employed in merchandize or buying and selling, from that of all other persons, arise necessarily from the nature of that sort of *capital* and *credit* by which traders commonly gain their living<sup>a</sup>. Other persons, who live upon the income of a fixed property, or by the emoluments of a profession or employment, in which no commodity, properly speaking, is bought and sold again for the purpose of improving a capital by the profits, are supposed neither to require nor to have occasion to give an extensive credit. A more extended credit indeed, is both required and allowed with respect to the proprietor of land, who in the cultivation of his property has occasion to buy and sell more than most other persons not engaged in trade; but then his *credit* is gained upon a *capital*, which is

<sup>a</sup> Ld. Loughborough Ch. J. in *Parker and Wells, Co. Bt. Law.* 41.

known,



## INTRODUCTION.

known, visible, and permanent, and consists principally of immoveable property. His person even as well as his property may be considered as in a manner stationary; and though he should remove the former out of the reach of his creditors, the latter, which was at once the foundation and the measure of the credit which they gave, cannot be removed, but remains as their security. With respect to the trader, all these circumstances are reversed. He both requires and has occasion to give the most extensive credit. This is necessarily involved with that of a variety of other persons, and has no other limits than the opinion which may be entertained of his prudence or integrity, and the supposed extent and profits of his dealings. These are intricate in their nature, and may be unlimited in their extent. His capital may consist altogether, and generally does for the greatest part, of moveable property. It is generally unknown, always uncertain, and perpetually fluctuating. It is continually going from him, and returning to him again. He is exposed not only to sudden and irreparable but also to secret losses; and he can easily remove his person, and his effects, when and whithersoever he pleases. In such a case, the immediate seizure of the person, the effects, and the accounts of the debtor, is obviously of the last importance to creditors, for the sake at once of security, discovery, and distribution. On the other hand,



## INTRODUCTION.

hand, on the part of the trader himself, if he has conducted himself honestly towards his creditors, made a full disclosure, and delivered up all his property to be divided amongst them, in satisfaction of their debts as far as it will extend; it appears equally reasonable, that in that case his creditors should release him from a strict and rigid performance of engagements, which, without fraud, and only through the casualties incident to trade, he has been disabled, completely to fulfil.

Bankruptcy, and Insolvency, though sometimes confounded, are things perfectly distinct in law. One who is insolvent may never become a bankrupt, or be capable of becoming so; and a bankrupt may finally prove to be solvent. The term bankrupt is appropriated exclusively to traders, and to such traders only, as come within certain specific descriptions, contained in the several statutes of bankrupt, by which the word itself was first adopted and applied in our law\*.

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\* Notwithstanding Lord Coke's fanciful derivation of the word *banqueroute*, it seems to have precisely the same meaning as *bankrupt*; *route* being probably an old participle of *rompre*, to break.

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BOOK THE FIRST.

OF THE PERSONS WHO MAY BE  
BANKRUPT.

ANY person, being a trader, and capable of BOOK I.  
contracting debts in the way of trade, may  
become a bankrupt.

The explanation of the several particulars of  
this general description, in the order in which  
they are here mentioned, is contained in the  
three following chapters: namely, first, with  
respect to the *Person*; secondly, with respect  
to the *Trade*; and lastly, with respect to the  
*Capacity of Contracting Debts* in the way of  
trade.

## CHAP. I.

*Of the Person.*

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13 *Eliz. c. 7. f. 1.*1 *Ja. c. 15. f. 2.*21 *Ja. c. 19. f. 2. 15.*4 *Geo. 3. c. 33. f. 3.*

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BOOK I.  
CHAP. I.

**A**LL *persons* whatever, using trade, are liable to the bankrupt laws; which afford no exemption in respect of degree, station, or place of birth. Peers, or others having privilege of parliament, are subject to them as well as common persons; and aliens, or denizens equally with natural-born subjects. One instance is mentioned of a commission formerly issued against a peer, who had traded in wines<sup>a</sup>; but it is obvious that, always in the case of peers, and during the continuance of privilege in the case of persons having privilege of parliament, there may be some powers which the commissioners of bankrupt cannot exercise, or at least not to the same extent, as in the case of ordinary persons.

<sup>a</sup> 1 Atk. 201.



## CHAP. II.

*Of the Trade.*13 *Eliz. c. 7. f. 1.*1 *Ja. c. 15. f. 2.*21 *Ja. c. 19. f. 2. 15.*7 *Ann. c. 12. f. 5.*5 *Geo. 2. c. 30. f. 39, 40.*

THE circumstances, which, in the interpretation of the statutes by the courts of justice, appear to have been held requisite to constitute a trading, or in the words of the statutes themselves, a using the trade of *merchandize in gross or by retail*, or seeking a trade of *living by buying and selling*, may perhaps without much impropriety be reduced to the several heads contained in the following sections.

BOOK I.  
CHAP. II.  
SECT. I.

*Requisites to constitute a trading.*

## SECT. I.

*The merchandizing or buying and selling, must be of that kind, in which the party gains a credit upon the profits of an uncertain capital stock<sup>b</sup>.*

<sup>b</sup> 2 Will. 171, 172.

I. This



BOOK I.  
CHAP. II.  
Sect. I.

1. This applies peculiarly to the case of those who live by mere buying and selling of *goods or other moveable chattels*, and by a credit gained upon the profits of a dealing merely in that way. A person coming under this description, seems to be the especial and peculiar object of the statutes, and to afford the perfect example of that kind of person for and against whom the bankrupt laws seem principally to have been framed: as, a *merchant*, a *grocer*, a *mercier*; or in one general word, a *chapman*, who is one that buys and sells any thing<sup>c</sup>.

*Scriveners, bankers, brokers, and factors*, and persons dealing in *exchange and rechange*, and gaining a profit by drawing and redrawing bills of exchange<sup>d</sup> (1), may also be included in the class now mentioned, as they make merchandize of money and bills, and gain an extensive credit upon the profits of that course of dealing, in the same manner as other merchants do by buying and selling or using the trade of merchandize in gross or by retail, with respect to other goods and moveable chattels<sup>e</sup>. The legislature, however, has thought proper to make *scriveners, bankers, brokers, and*

<sup>c</sup> 2 Bl. Comm. 476.

<sup>d</sup> Richardson and Bradshaw,  
1 Atk. 128. Hankey and Jones,  
Cowp. 745.

<sup>e</sup> 2 Bl. Com. 473, 475. Ld.

Loughb. Ch. J. in Parker and  
Welis, Co. B. L. 43.

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(1) Those engaged in a general dealing of this kind are commonly known by the name of *exchange-brokers*. Cowp. 749.

factors

factors subject to the bankrupt laws, by express provision, of which the real ground seems to have been the greater opportunities which such persons have of defrauding their creditors; scriveners receiving other men's monies or estates into their trust or custody<sup>f</sup>, and bankers, brokers, and factors being frequently intrusted with great sums of money and with goods and effects of very great value belonging to other persons<sup>g</sup>. The receiving and managing of other people's money seems formerly to have been confined to scriveners; but bankers afterwards taking upon them that employment, it became necessary for the legislature to make these in like manner subject to the bankrupt laws<sup>h</sup>.

It is not every receiving of the money of others and making some kind of use of it that makes a *scrivener* within the statute. When that statute passed, the business of a scrivener was well understood, and the statute had in view those particular persons who *eo nomine* carried on the business of a scrivener. One, who being a clerk in the custom-house, takes debentures for merchants, and receives the money, has a commission on the receipt of it, keeps it in his possession, and discounts bills with it for his own use, does not thereby become a scrivener<sup>i</sup>. The business of a *scrivener* is said to be that of

<sup>f</sup> 21 Ja. c. 19. s. 2.<sup>g</sup> 5 Geo. 2. c. 30. s. 39.<sup>h</sup> 1 Atk. 218.<sup>i</sup> Hamson and Harrison, Esp.  
N. P. 555.

receiving

BOOK I.  
CHAP. II.  
Sect. I.

receiving money belonging to other people, and placing it out *on securities* <sup>k</sup> (2).

A *pawn-broker*, though not expressly named, is included in the generic term of *broker*<sup>l</sup>.

2. Persons who *buy* goods or the raw materials of trade, and *sell* them again, though under another form, or improved by the labour of *manufacture*, are also within the statutes: as bakers, brewers, butchers, shoe-makers, smiths, tanners, taylors, &c. &c. &c.<sup>m</sup>. Here, though some part of the gain is by mere bodily labour, yet it arises also in part, by buying and selling: and such persons live very much by a credit gained upon the profits of a *stock in trade*; the labour being only in *melioration*, as it is called, of the commodity, and rendering it more fit for sale. The persons coming under this description, are plainly distinguishable from

<sup>k</sup> Exp. Wilson, 1 Atk. 218.

<sup>m</sup> Cro. Car. 31. 3 Mod. 155.

<sup>l</sup> Highmore and Molloy,

330. Ld. R. 610. 741. 1480.

1 Atk. 206.

Good. 11, 12, 13. Burr. 2148.

(2) Ld. Hardwicke, (Exp. Burchall, 1 Atk. 141.) thought scriveners clearly within the 5 Geo. 2. c. 30. s. 39. and comprehended in the words bankers, brokers, and factors; yet it is no essential part of the business of bankers, brokers, and factors to place money out upon securities. In Willett and Chambers, Cowp. 814. Ld. Mansfield seems not to have considered it as an essential part of the business of a scrivener, that of receiving the money into his trust and custody. That however is the specific description of a scrivener used in the statute, and seems to be the very circumstance which has induced the legislature to bring scriveners within the operation of the bankrupt laws.

the



the mere *working* tradesmen bearing the same names respectively; who, purchasing nothing, or at most, only the tools for working upon the materials put into their hands, belong to the class to be next mentioned.

BOOK I.  
CHAP. II.  
Sect. I.

3. Labourers, husbandmen, artisans, or mere working tradesmen, and the like, cannot be made bankrupts. Here is *no capital* stock, nothing bought and sold; and the party seeks his living, not by buying and selling, or by a credit gained upon any stock in trade, but by his personal labour only<sup>n</sup>.

4. The owner of an interest in *land* (the most *certain* of all *capitals*) though he has occasion to buy and sell considerably, yet if his buying and selling is for the purpose merely of raising and bringing to market, and disposing of the produce and profits of his *land*, is held not to be within the statutes<sup>o</sup>: as, a *farmer*<sup>p</sup>; who has besides (apparently out of a superabundant caution) (3) been expressly excepted, together with *graziers* and *drovers*, by a particular statute<sup>q</sup>. Antecedent to that statute it had been held, that a grazier or a drover might as such be made a bankrupt<sup>r</sup>; but it should seem improperly, in any case of a grazier;

<sup>n</sup> Cro. Car. 31.

<sup>o</sup> 2 Willf. 172.

<sup>p</sup> March 35. 3 Mod. 330.

<sup>8</sup> Mod. 48. 2 Willf. 171, 172.

<sup>q</sup> 5 Geo. 2. c. 30. s. 40.

<sup>r</sup> Good. 12, 13. 169. 175.

(3) Suggested probably by the jealousy of landlords. 2 Bl. Com. 475.

and

BOOK I.  
CHAP. II.  
Sect. I.

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and also in that of a drover where described as a person having connection with *land*; and it is this latter circumstance which makes the distinction between him and the salesman\*. Accordingly it has been since determined, that one who buys cattle at one fair, keeps them on his *land*, and then drives them to another fair to sell, is a drover within the *exception* of this statute†.

Upon the same principles, the *buyer of a coal mine*, who works it and *sells the coals*, is not within the statutes‡.

Nor one who buys a few ingredients or materials, necessary for the purpose of *meliorating* the produce of his *land*, or of making it more vendible, and who sells such produce in that improved state: as, an owner or farmer of alum rocks⁴, a farmer who makes cheeses for sale⁵, or a man who sells cyder made from the apples of his own orchard⁶. In all such cases and many others of a like nature which might easily be put, though several materials or ingredients are bought, and some kind of manufacture exercised, yet inasmuch as it is the necessary and usual mode of reaping and enjoying the produce of the *land*, and bringing it advantageously to market, such persons are not held to be, on that account, traders.

\* Ld. Loughb. in Parker and Wells, Co. B. L. 43, 44.

† Mills & Hughes, Bull. N.P. 39.

‡ Port and Turton, 2 Will. 169.

⁴ Newton and Newton, Co. B. L. 46. 60.

⁵ Ld. M. in Parker and Wells,

1 T. R.

⁶ Ld. L. in Parker and Wells, Co. B. L. 47. and Ld. M. in S. C.

1 T. R.

The case of a *brick-maker* has been variously considered<sup>a</sup>. Brick-making for general sale by one who buys the clay, sand, and other materials, is admitted to be clearly a trading. But whether a man exposing to sale, bricks made of the clay dug from his own soil, or from that which he rents, and buying the other materials necessary for converting the earth into bricks, shall or shall not be considered as a trader within the spirit of the bankrupt laws, is a question not yet finally settled. On the one hand, it is said, 1. That this case is not to be distinguished from that of any other farmer or owner of an interest in land, who may avail himself of the produce, either entirely, without the addition of any other materials, or by a mixture of small ingredients in order to put that produce into a marketable state, without on that account subjecting himself to the bankrupt laws. 2. That supposing the land afforded not only the clay, but likewise the sand and fuel, it would seem a singular distinction to make, that in that case the owner of such an estate making bricks and selling them shall *not* be subject to the bankrupt laws; but if he should occasionally go to the next field to get sand out of it, or to buy sand and fuel of the owner of that estate, that *this* would be a sufficient buying and selling to say that he seeks his trade of living by buying and selling. 3. That the rent paid for the

<sup>a</sup> Exp. Harrison, 1 Bro. 173. Parker and Wells, Co. B. L. 41. S. C. 1 T. R. 34. 1 Bro. 178.



BOOK I.  
CHAP. II.  
Sect. I.

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land is not a buying of the earth within the meaning of the words buying and felling used in the statutes: which must be that of an actual commodity, as of earth by the load, buying it as earth, and not taking it as part of the profits of the land. On the other hand, it is contended, that the distinction turns upon the nature and manner of exercising the manufacture, and the motive with which it is carried on: that where the produce of the land is merely the raw material of a manufacture, and used as such, and not as the mode of raising the produce of the land, and is an insignificant article compared with the expence of the whole manufacture, there, in truth, he is, and ought to be considered as a trader; and that in such a case, where the ground is taken with a view to carry on a trade for public sale, and the land produces nothing, and he has nothing to do as a farmer, his sole object being the making of bricks for sale, the lease is merely a purchase of the clay, and just the same as if he had bought it at so much the load (4).

### 5. Buying

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(4) In the argument on this side of the question, several of the circumstances upon which the distinction is made to turn, are subject to such variety of degrees and modifications, as hardly afford any well-defined or fixed principle, and must leave the application of it, such as it is, open to a great deal of uncertainty and discussion in each particular case. Upon the other points, namely, that the land produces nothing, that the lease is merely

5. Buying and selling of land or an interest in land, or land jobbing, is not within the statutes<sup>b</sup>.

BOOK I.  
CHAP. II.  
SECT. I.

6. Nor buying and selling of bank stock or other government securities<sup>c</sup>; they being, it is said, not such goods, wares, or merchandize as are within the intent of the statute(5).

## SECT.

<sup>b</sup> March 35. Port and Turton, 2 Will.

<sup>c</sup> 2 Bl. Com. 476.

a purchase of the clay, that the tenant has nothing to do as a farmer, his sole object being, &c. &c. it can hardly fail to strike observation, that the same may be said of a colliery or an alum rock; and the want of that essential branch of the description of a trading, namely, a *buying* of the commodity, seems to be but unsatisfactorily supplied by the subtlety of considering the lease of the ground, as a buying of the clay.

(5) For this position, Mr. J. Bl. cites the authority of a case in 2 P. W. 308. But the words used by Ld. King in that case seem rather to refer to a clause in the statute of frauds, and not to any in the statutes of bankrupts, which do not, in the description of a trading, use the words, goods, wares, and merchandizes. Ld. King, indeed, seems to consider it as a consequence of the statute of the 13 and 14 Car. 2. "that stocks, or a dealing in them, will not make a man liable to bankruptcy." That statute, however, related only to persons who, without any view to trade, invested their money in certain companys' stocks, the dividends on which were partly made in goods, and which the parties sold again in order to avail themselves of their property; but becoming partners in a trading company, they might have been considered as traders; and the statute became necessary in order to exempt them from such a consequence: (Good. 17.) But it says nothing of buying and selling the stock itself, which is quite another kind of thing. At the same time, buying and selling

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of

*It must also be a repeated practice of both buying and selling, and a seeking a living by it<sup>d</sup>.*

Buying only, or selling only, is no trading: as, where one imports goods without selling the proceeds so imported<sup>e</sup>; or after he has given over trading, sells off his former stock which he could not put off immediately upon his ceasing to trade; or where one sells off a surplussage of goods, bought for a special purpose or for private use<sup>f</sup>.

Nor a single act of buying and selling<sup>g</sup>.

Nor drawing, or drawing and redrawing, bills of exchange merely for the purpose of raising money to improve a man's own estate, or for other private occasions, and not with a view to gain a profit upon the exchange<sup>h</sup>.

The merely being possessed of an interest or share in a property which may be used for the pur-

<sup>d</sup> 2 Bl. Com. 476.

<sup>e</sup> 2 Bl. Com. 476.

<sup>e</sup> 2 Keb. 487.

<sup>h</sup> Hankey and Jones, Cowp.

<sup>f</sup> 1 Vent. 29. 270. 3 Keb. 451.

745.

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of stocks, seems not to be a trading within the statutes, upon another ground: they are more in the nature of a fixed property, than of a trading capital, and the buying and selling of them, seems rather to resemble land jobbing, or that of only buying a particular estate, and selling it again at a profit. But those who buy and sell stock by commission are clearly within the statutes, as a species of *brokers*.



poses of trade, as the being a part owner in a ship, barge, or waggon, does not make a man a trader<sup>1</sup>.

Nor the being possessed of a share in a joint stock with others who trade<sup>k</sup>; unless he shares in the profit and loss upon the disposition of it in a way of trade, that is, in actual buying and selling<sup>l</sup>.

Lord Holt thought a share in the stationers company would not make a man liable to become a bankrupt; but Lord Keeper Wright held otherwise<sup>m</sup>. In such cases, the question, it should seem, would depend upon whether the party, by means of his stock, has a direct concern in the trade by a participation of profit and loss, or only puts his money into the company as a way of placing it to advantage, and receives a fixed dividend upon a given stock. In the former case, it seems as much a trading whereby the party seeks his living, as in the common case of a private partnership in trade; in which every partner, although he does not act personally in the management, nor his name appear in it, is obviously a trader, and liable to all the consequences of such a situation<sup>n</sup>. But by particular statutes, the holders of stock, in a variety of public trading companies, are declared not liable to be made bankrupts in respect of their stocks in such companies: as, the members of the bank of England; East India, South Sea, Guinea, or English

<sup>1</sup> Vent. 29. Sid. 411. 3 Mod.  
329. Exp. Bowes, 4 Vez. J. 168.

<sup>k</sup> Salk. 109.

<sup>l</sup> Vent. 29. 2 Keb. 487.

<sup>m</sup> Bird and Major, Ld. R. 851.

<sup>n</sup> Palm. 325.

BOOK I.  
CHAP. II.  
Sect. III.

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linen, companies; royal fishing trade, London  
Assurance or Royal Exchange, &c. &c.<sup>o</sup>

SECT. III.

*It must also be in the general way of merchandize, and not in a qualified manner only; or under particular restraints, or only for special purposes<sup>p</sup>.*

1. An inn-keeper cannot, as such, be made a bankrupt<sup>q</sup>. He does not buy his corn, hay, and other provisions for the purpose of sale, in the common way of merchandize. His proper business is providing lodging and entertainment for travellers and other guests; and what he buys is for the particular purpose of spending in his house by way of accommodation to his guests only. He does not properly *sell* his commodities, in the way of contract or bargain for their own intrinsic value as commodities, in the manner traders at large do; but rather utters or furnishes them, at certain reasonable rates made up of many *extrinsic* circumstances additional to the mere selling price; as, that of the hire of his rooms and furniture, his personal labour in the way of service, attendance, and the like.

<sup>o</sup> 13 & 14 Car. 2. c. 24. 8 & 9  
W. c. 20. s. 47. 3 Geo. 1. c. 3.  
6 Geo. 1. c. 18. 8 Geo. 1. c. 21.  
4 Geo. 3. c. 37. and see, for case  
of Sir J. W. which gave occasion  
to 13 & 14 Car. 2. Hugh, Abr.

tit. Bankrupt, and Good. 17.

<sup>p</sup> 2 Bl. Com. 476.

<sup>q</sup> Crisp and Pratt, Cro. Car.  
549. March 34. Newton and  
Trigg, 3 Mod. 329.

Nor a victualler; upon the same principles<sup>r</sup>.

BOOK I.  
CHAP. II.  
SECT. III.

Nor a schoolmaster, who buys and dresses provisions for his boarders<sup>s</sup>; or who buys books and shoes, and sells them at an advanced price to his scholars<sup>t</sup>.

Nor the owner of a mine, who buys candles, and sells them to his workmen<sup>u</sup>.

2. A commissioner of the navy, who victuals the fleet by a contract with the king; a gun-founder for the king's service; the king's butler, steward, or other officer; officers of excise or customs; sutlers of armies; butlers and stewards of inns of court; are not liable, as such, to be made bankrupts; the merchandizing or buying and selling in such cases being in the way of *particular* employments, and only for *special* purposes<sup>x</sup>.

Nor a receiver of the king's taxes<sup>y</sup>; or any persons circulating exchequer bills<sup>z</sup>.

## SECT. IV.

*And it must be in the party's own right.*

For this position, however, I am not aware of any express authority. The case cited in support

<sup>r</sup> Saunderson and Rowles, 276. 3 Keb. 451. 2 Bl. Com. 476. Burr. 2064. 477.

<sup>s</sup> 3 Mod. 330. 1 Vent. 270.

<sup>y</sup> 5 G. 2. c. 30. s. 40. 2 Bl. Com. 475.

<sup>t</sup> Valentine and Vaughan, Peake 76.

<sup>z</sup> See the several statutes relative thereto.

<sup>u</sup> Co. B. L. 58.

<sup>x</sup> Vent. 270. Sho. 269. Skinn.



BOOK I.  
CHAP. II.  
Sect. IV.

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of it<sup>a</sup> by Mr. Cook<sup>b</sup> can hardly be considered as such, for there Lord Hardwicke only held that an executor *disposing* of the *stock* of his testator, though he also bought some things necessary to render it more fit for sale, was not on that account liable to be made a bankrupt. But it is obvious that this case is rather like that which has been mentioned above, of merely selling off the effects of a former trading; and in a more recent case<sup>c</sup> *Ld. Thurlow* is said to have intimated that where a testator had ordered the residue of his estate to be employed in carrying on his trade, the executor *carrying on the trade* with it, though his name did not appear, might be a bankrupt, and would be personally liable for the debts. With respect to this, however, it may be observed that though a person may carry on a trade in *autre droit* as executor or trustee, and if those with whom he deals are not apprised of the capacity in which he acts, or the circumstances of the fund upon which the trade is carried on, may make himself personally liable, for this would be trading on his own personal credit; yet it is not easy to imagine how a person acting notoriously and *bonâ fide* in the capacity of a trustee, can become a bankrupt in respect of such trading, unless he could be supposed capable of committing an *act of bankruptcy* also, in *autre droit*.

<sup>a</sup> *Exp. Nutt*, 1 *Atk.* 102.

<sup>b</sup> *Co. B. L.* 67.

<sup>c</sup> *Hankey and Towgood, Co.*  
*B. L.* 67.

*Circumstances*

*Circumstances not requisite.*

Where a party uses a trade of merchandize or of buying and selling, in which the requisites above enumerated concur, the following circumstances will not prevent his being considered as a trader within the statutes :

1. Although it should not be his *principal* means of living : as, where an innkeeper or victualler sells out of doors as well as in his house, or a farmer occasionally buys and sells horses, not for the use of his farm, but with the view of making a profit by it ; they may be bankrupts in respect of such collateral dealing<sup>c</sup>. It is not the number of instances or the extent of the trade, but the manner of dealing that is material ; and that the party sells generally to any body who chuses to apply, and not by way of favour only, to oblige particular persons.

And although the party should, as coming under some *one* description, be *not* liable to the bankrupt laws ; as, a farmer, innkeeper, victualler, member of the East India, or other public company, officer of excise, lawyer, artificer, &c. &c. yet he will not be exempted, if he comes within them in any *other* shape<sup>d</sup>.

<sup>c</sup> Patman and Vaughan, and Bartholomew and Sherwood, 1 T. R. 572, 573.

<sup>d</sup> 1 Vent. 270. 13 & 14 Car. 2. c. 24. Exp. Harrifon, 1 Bro.

Mayhoe and Archer, Str. 514. Buscall and Hogg, 3 Will. Patman and Vaughan, and Bartholomew and Sherwood, 1 T. R.

BOOK I.  
CHAP. II.  
Sect. IV.

2. Although eventually, he should happen *not to gain* by his trading<sup>e</sup>.

3. Although the *trading* should be *illegal*; as in the case of a clergyman, or of one dealing merely in smuggling and running of goods; for a man cannot take advantage of the breach of one law, in order to avoid being subject to another<sup>f</sup>.

4. Although the trading should not be carried on *wholly* in *England*. Buying only in England, and selling beyond sea, or buying beyond sea, and only selling in England, is sufficient<sup>g</sup>.

5. Although the party should not *reside here*, provided only that he trades *to* England. Any person, native, denizen, or alien, residing out of England, either in any part of the British dominions or in foreign countries, though never a resident trader in England, yet if he trades *to* it, and comes here, and commits an act of bankruptcy here, is an object of the bankrupt laws<sup>h</sup>. This has been decided, however, more from respect to former authorities<sup>i</sup>, than from conviction of the propriety of the determination upon principles either of justice or convenience; 1st, as extending to foreigners, coming here only occasionally, the operation of a law which must, in some respects, be considered as a criminal law of a nature purely

<sup>e</sup> 1 Atk. 129. 1 T. R. 572.

<sup>f</sup> Exp. Meymot, 1 Atk. 196.

<sup>g</sup> Dodsworth and Anderson, Raym. 375.

<sup>h</sup> Alexander and Vaughan,

Cowp. 398. and cases there cited.

<sup>i</sup> Dodsworth and Anderson, Raym. and Bird and Sedgwick, Salk.

local;



local; and next, as affording an opportunity to traders to come from different parts of our dominions, and hurry through commissions behind the backs of their creditors (6).

BOOK I.  
CHAP. II.  
SECT. IV.

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6. Though the party does not keep an open shop<sup>k</sup>.

<sup>k</sup> Exp. Wilfon. 1 Atk. 218.

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(6) This inconvenience, however, is endeavoured to be remedied by suspending the certificate.

## CHAP. III.

*Of the capacity of contracting debts in trade.*BOOK I.  
CHAP. III.

THE bankrupt laws being framed only for the purpose of giving a speedier and more effectual remedy to creditors, and relief to debtors, it is extremely plain that no one can be a bankrupt in respect of debts which he is not liable at law to pay<sup>a</sup>.

Therefore an *infant*, as he is liable only for necessaries, and is not chargeable for goods sold to him in the way of trade<sup>b</sup>, cannot be a bankrupt in respect of such debts incurred during his infancy; though the act of bankruptcy should be committed after his being of age<sup>c</sup>.

Nor a *feme covert*: who by the general rule of law is incapable of making any contracts at all to bind herself without her husband. And if a single woman being a trader, and committing an act of bankruptcy, afterwards marries, a commission against her issued after the marriage cannot be supported: the creditors of the wife becoming by the marriage the creditors of the husband<sup>d</sup>.

But in cases where this general incapacity is removed, a *feme covert* has been held liable to a

<sup>a</sup> Ld. Raym. 443. <sup>2</sup> Bl. Com. 477.

<sup>b</sup> Cro. Ja. 494. Str. 1083. Bull. N. P. 154.

<sup>c</sup> Whitelock's ca. Ca. t. King 46. Exp. Sydebotham, 1 Atk. 146. 201.

<sup>d</sup> Exp. Mear, 2 Bro. 266.

commission

commission of bankrupt like a feme sole: as, where she is a sole trader according to the custom of London<sup>e</sup> (7). BOOK I.  
CHAP. III.

Upon the same principle it should seem she might be liable to a commission in other cases where she may be sued at law, and charged in execution as a feme sole. At law, it has been held in cases of the exile or abjuration of the husband, or where he has been transported, and also in those of a separation by agreement with a separate maintenance, that the wife may be sued as a feme sole, for debts contracted by her while in such situations<sup>f</sup>. But I believe there is but a single case of the kind that has occurred in bankruptcy<sup>g</sup>, which was that of a wife living apart from her husband under articles of separation, by which a part of his estate and effects was assigned to *trustees* upon trust for the wife as her separate estate, with liberty for her to trade without interruption from her husband, and saving him harmless from all debts then owing by him in trade, and from all contracts to be thereafter entered into by her in the way of trade or

\* Exp. Carrington, 1 Atk. 206. Lavie and Philips, Burr. 1776.

<sup>f</sup> See Corbett and Poelintz, 1 T. R. 5. and Compton and Collinson, H. Bl. 334. and cases

there cited. But see also Ellam and Leigh, 5 T. R. 679. and Hyde and Price, 3 Vez. J. 443.

<sup>g</sup> Exp. Preston, Green's Bt. Law, 8.

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(7) The custom extends only to such trade as she uses on her sole account, and wherein the husband does not intermeddle. Burr. *ibid*.

( otherwise.



otherwise. The separation having taken place, and the husband gone abroad, the wife carried on trade in her own name as a sole trader, and having committed an act of bankruptcy, a commission was taken out against her. The commissioners being of opinion they could not find her a bankrupt, being a feme covert and not within the custom of London; they were afterwards, upon petition to Lord Ch. Apsey, ordered to proceed to declare her a bankrupt, and she was declared a bankrupt accordingly<sup>b</sup>.

A *clergyman*, though prohibited under a considerable penalty by the 21 H. 8. c. 13. from making any *contract* whatever in the way of *trade*, and every such contract is declared utterly *void*, and of no effect; yet still if he will trade, is held to be subject to the bankrupt laws<sup>i</sup>. The prohibition is construed so as to make it a penalty upon himself only, and not so as to avoid the contract, for his own benefit, or to exempt him from any remedy the creditor may have against him.

<sup>b</sup> Exp. Preston, Green 3.

<sup>i</sup> Exp. Meymott, 1 Atk. 196. Hankey and Jones, Cowp. 745.

## BOOK THE SECOND.

*OF THE ACTS WHICH MAKE A PERSON A  
BANKRUPT.*

THE bankrupt law, having for a principal object, the securing to creditors as large a proportion of their debts as possible, has provided with particular care, for enabling them, on the very first appearances of fraudulent design, or of insolvency in a trader, to avail themselves of the peculiar remedy which that law affords them of compelling an immediate surrender and distribution of all his property. On the other hand, to guard against a rash or capricious exercise of this right, it has, with a minute anxiety, in very precise and explicit terms, described each several and particular act that is to be considered as affording such presumption of insolvency or fraud, as shall entitle his creditors immediately to have recourse to that extraordinary and summary mode of proceeding.

BOOK II.

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BOOK II.

The several acts of this kind, (or *acts of bankruptcy* as they are called), described in the statutes, may be ranged under three general classes, which will be the subject of the three following chapters: namely, 1. those which relate to the person of the trader, and which are considered as fraudulent endeavours to defeat the creditors of their legal remedy against the person. 2. Those which relate to dispositions of his effects, and which are considered as fraudulent endeavours to defeat them of their remedy against his property, and 3. Of those which relate merely to the state of his circumstances or credit, and which are considered as presumptions of insolvency, but in which, fraud, though it may exist, is not a necessary ingredient. In a fourth chapter I shall consider such circumstances as relate to acts of bankruptcy in general.



## CHAP. I.

*Of acts of bankruptcy which relate to the person of the trader, and which are considered as fraudulent endeavours to defeat creditors of their legal remedy against his person.*

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13 *Eliz. c. 7. s. 1.*

1 *Fa. c. 15. s. 2.*

21 *Fa. c. 19. s. 2.*

4 *Geo. 3. c. 33. s. 1.*

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## SECT. I.

*Departing the realm.*

THIS must be done with *intent* to defraud or delay creditors. When therefore it appears that the party had no such intention, although his creditors are in fact thereby delayed, it is not a departure within the meaning of the statute: as, where one goes abroad only to avoid a criminal process, as a writ *de excommunicato capiendo*; or process to enforce a duty, as a decree in Chancery to execute a conveyance<sup>a</sup>; or if he goes abroad

BOOK II.  
CHAP. I.  
Sect. I.

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<sup>a</sup> Good. 20—22. Com. Dig. tit. Bankrupt, C. 1.

with

BOOK II.  
CHAP. I.  
Sect. I.

with the knowledge and consent of his creditors<sup>b</sup>. But going to avoid process upon a decree for the payment of *money*, is clearly within the statute<sup>c</sup>.

A different rule of construction of the statute appears to have been for some time adopted, upon the authority of the case of one *Woodier*, who went abroad on account of having killed his wife; in which case, it has been said, it was settled, that if a man goes abroad, though not with intent to delay creditors, but they are in fact thereby delayed, it is an act of bankruptcy<sup>d</sup>; and this authority has been followed in two subsequent cases, in one of which, the party went abroad for the purpose of effecting designs upon a young lady, and in the other, to avoid an impending prosecution<sup>e</sup>.

The former construction, however, has been re-established in a very late case, in which a similar question was made with respect to an act of bankruptcy by departing from the dwelling house<sup>f</sup>. Upon that occasion it was held, that the words of the statute of *Ja.* "to the intent *or* whereby his creditors shall or may be delayed, &c." are not to be taken in the sense of an alternative; but that *or* is to be construed as *and*; and that the *intent* to delay is, as well as the mere fact of departure, an

<sup>b</sup> Good. ib. and see Dav. 39.  
for Ld. Ch. J. Lee's direction to  
the jury in Gulton's case.

<sup>c</sup> Good. ib.

<sup>d</sup> Bull. N. P. 39.

<sup>e</sup> Raikes and Poreau, Co.B.L.  
73. Vernon and Hankey, ib. 95.

<sup>f</sup> Fowler and Padget, 7 T. R.  
509.

essential part of the description of such acts of bankruptcy (8).

BOOK II.  
CHAP. V.  
SECT. II.

SECT. II.

*Departing from his dwelling house.*

This also must be done with *intent* to defraud or delay creditors, and may therefore be explained by circumstances to negative that intent; though, the mere departure is sufficient *prima facie* evidence of it<sup>a</sup>. It is an act of bankruptcy if done to avoid an attachment to compel the payment of *money* upon an award, but not an attachment for not delivering goods, or process to compel performance of a *duty* merely<sup>b</sup>; nor, if the de-

<sup>a</sup> Burr. 484. Philips and Sheriff of Essex, Green. 52. Aldridge and Ireland, cited 7 T. R. 512. Fowler and Padget, 7 T. R. 509.

<sup>b</sup> Good. 22. Com. Bank. C. 1. Lingood and Eade, 1 Atk. 196. 240.

(8) As to the case itself of *Woodier*, to which so much respect has been shewn; it is said (upon authority however, perhaps not much to be regarded, Dav. 92.) that it appeared to the commissioners he *had* committed *other* acts of bankruptcy. At all events it seems not a little remarkable, that some time after that case is said to have been cited, and relied on by Sir J. Strange, (Hil. 12 Geo. 2. Bull. N. P. 39.), Ld. C. J. Lee is reported to have directed the jury in *Gulston's* case (17 Geo. 2. 13 Dec. 1743.), "that they were to consider—whether his *going* abroad " was with an *intention* to defraud his creditors; or whether it " was publicly *known* and *consented to*, though he *staid* longer " than the time (Dav. 39.)."

D

parture



BOOK II.  
CHAP. I.  
Sect. II.

parture is compulsory, as in the case of being arrested<sup>i</sup>. But a voluntary departure for ever so short a time is sufficient, if done clearly with intent to delay creditors; as where one left town to avoid an arrest for the purpose of gaining the term and returned the same day<sup>k</sup>. As the *intent* to delay creditors, is essential, as well as the mere fact of departure; so the *departure* with the *intent* to delay, has in a late case been held not sufficient without the fact also of an *actual delay* of some creditor. That was where a trader departed with intent to delay creditors, and during his absence, the sheriff's officer was denied admittance into the house to levy under a writ of *fieri facias* against the goods; this was held not sufficient to constitute the act of bankruptcy; for the writ not being against the *person*, his *absence* was immaterial, in respect to the execution of it<sup>l</sup> (9).

SECT.

<sup>i</sup> Philips and Sheriff of Essex.  
Gr. 52.

<sup>l</sup> Barnard and Vaughan,  
8 T. R. 149.

<sup>k</sup> Maylin and Eylo, Stra. 209.

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(9) Considering the act of bankruptcy by departure, as founded on the principle of its being an attempt to defeat creditors of their remedy against the person, an attempt to defeat process against the goods is clearly not *evidence* of it. But I do not apprehend that in this case it was meant that there must always be direct evidence of an actual delay, such as the actual issuing of a writ against the person, and its being defeated by the departure. In a case on this subject at Guildhall, Ld. Kenyon held,

SECT. III.

BOOK II.  
CHAP. I.  
SECT. III.

*Beginning to keep house.*

The usual *evidence* of this act of bankruptcy is the being denied to a creditor who calls for money. Formerly, the simple act as described in the statute, of beginning to keep house with the intent to delay, was held sufficient, without such intent being followed by an actual delay of any creditor<sup>m</sup>: but this has been since overruled, and it has been held, that an order to be denied is not enough without an actual denial<sup>n</sup>. And the matter has been carried still further in a very late case, in which it was held, that such actual denial is the *indispensable* evidence of this act of bankruptcy of beginning to keep house<sup>o</sup> (10).

<sup>m</sup> Dickenson and Foord,  
Barnes 160.

<sup>o</sup> Garratt and Moule, 5 T.  
R. 575.

<sup>n</sup> Hawkes and Saunders,  
Co. B. L. 74.

held, that evidence of the bankrupt's declarations to the witness, that his departure was to avoid arrests which he merely apprehended, was sufficient (Wilson and Norman, Esp. N. P. 334); and that it was not necessary to prove a writ actually out against him. Yet this was not evidence of actual delay, but only of the *intent* to delay.

(10) Does not this seem to convert a particular *evidence* of the act into the act itself? And may there not be *other* evidence of the *intent* of "keeping house" than merely a denial? If in *reason*, there may be, why in *law*, *must* there not?

BOOK II.  
CHAP. I.  
Sect. III.

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The denial, however, must be with the *intent* mentioned, and is subject, therefore, to the distinction of the cases, of avoiding a *debt* or avoiding a *duty*; and is open to be explained by circumstances, as where it is done on account of sickness, being engaged in company, particular business, the lateness of the hour, and the like<sup>p</sup>.

It must also be a denial to a creditor<sup>q</sup>, and a creditor having a debt demandable at the time. A denial, therefore, to a creditor, by note payable at a future day, is no act of bankruptcy<sup>r</sup>; and a denial to a person coming only on *behalf* of a creditor has been held insufficient<sup>s</sup>: but this strictness has been relaxed, or at least the objection has not been taken in later cases, where the act of bankruptcy was a denial to a creditor's clerk<sup>t</sup>. It is not necessary that the bankrupt should give orders to be denied to any particular person by name; an order to be denied to every body includes creditors, and being followed by actual denial to a creditor, is a keeping house<sup>u</sup>.

Keeping house for ever so short a time<sup>x</sup>, if the denial and intent to delay are clearly proved, is

<sup>p</sup> Com. Bankt. C. 1. Exp. Hall 1 Atk. 201. Burr. 484. Bull. N. P. 39. Round and Hope Byde, Co. B. L. 92.

<sup>q</sup> Jackman and Nightingale, Bull. N. P. 40.

<sup>r</sup> Exp. Levi, 7 Vin. 61.

<sup>s</sup> Barrow and Forster, Gr. 44.

<sup>t</sup> Bramley and Munde, Bull. N. P. 39. Colkett and Freeman, Co. B. L. 79.

<sup>u</sup> Round and H. Byde, C. B. L. 92.

<sup>x</sup> Palm. 325.

sufficient:



sufficient: as, where one was denied with that intent, to a creditor who called in the morning with a bill for payment; though he afterwards in the course of the day appeared in public, and having procured money, paid the bill before five o'clock of that day, and though the holder of the bill might in point of law have waited to receive payment the whole of that day on which the bill became due, without its being such a laches as would discharge the indorser, yet this was held a complete act of bankruptcy<sup>y</sup>.

If a man having no house of his own, keeps in another man's house, it is within the statute<sup>z</sup>; or keep on ship-board<sup>a</sup>; or, (as it is quaintly said), if a miller keep himself within his mill, or a churchwarden within the church<sup>b</sup>(11).

<sup>y</sup> Colkett and Freeman, 2 T. R. 59.

<sup>a</sup> Stone 123.

<sup>b</sup> Com. Bankt. C. 1.

<sup>z</sup> Stone 124. and see a case mentioned in Colkett and Freeman, 2 T. R.

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(11) Insolvent merchants, millers, and churchwardens keeping their respective houses, the ship, the church, and the mill, seem to have been favorite cases with the old writers.

*Or otherwise absenting himself.*

A man having no constant dwelling, but who absents himself for debt, from his usual abode, is within the statute<sup>c</sup>.

*Procuring or obtaining any protection, not being privileged by parliament.*

It has been held, that the protection of one, as the king's servant, is not within the statute<sup>d</sup> (12); but the protections which seem to have been the objects of this law, namely, to stay the suits of creditors, have been long fallen into disuse, the last instance of such a protection mentioned in our books being above a century ago<sup>e</sup>.

By the 7 *Ann.* c. 12. traders are declared not to be entitled to the protection given by that act to the servants of ambassadors and other public ministers.

<sup>c</sup> Com. Bankt. C. 1.<sup>e</sup> 3 Bl. Com.<sup>d</sup> Ryder and Fowle, Skinn. 21.

(12) In the case above cited, the protection was considered as a privilege of parliament, though perhaps it ought not to have been so considered. See 2 T. R.

SECT. VI. VII.

BOOK II.  
CHAP. I.  
Sect. VI.

*Exhibiting to the king or any of his courts any petition or bill against creditors to procure longer time of payment, or to compel them to accept less than their just debts.*

*Taking sanctuary.*

These two still remain in the statute book; but such petitions or bills have been long exploded<sup>f</sup>, and sanctuary was taken away by the 21 Ja. c. 28. s. 6, 7.

SECT. VIII.

*Suffering himself willingly to be arrested, &c. or yielding himself to prison.*

This is to be understood not only of arrest, &c. for a fictitious debt<sup>g</sup>; but also of a yielding to prison even for a just debt, if done with the *intent* to delay creditors; as where one being arrested for a real debt, and having money sufficient to pay it, yet chose rather to go to prison, in order, as he declared, to *force* his creditors to come to a composition<sup>h</sup>.

<sup>f</sup> 1 Vern. 153.

<sup>h</sup> Exp. Barton, 7 Vin. 61.

<sup>g</sup> Good. 23. Com. Bankt. C. 2.



*Suffering himself to be outlawed.*

The outlawry suffered must be with the intent to defraud creditors<sup>1</sup>; but it is said it will not make a man a bankrupt if reversed before the commission issues, or for default of proclamations after the commission<sup>2</sup>. Quære of this, if the outlawry was originally fraudulent<sup>3</sup>.

## SECT. X.

*Being arrested for 100 l. or more, of just debt, after such arrest escaping out of prison.*

The escape must be such as shews he means to run away and defeat his creditors. Where, by permission of the sheriff, he is carried through a different county, in his road to a judge's chamber upon a *habeas corpus* to be turned over, this is no escape in the sense of this act of parliament; he remains substantially in custody, notwithstanding his being thus carried into another county. It must be an escape against the consent of the sheriff<sup>m</sup>.

The statute seems to make this an act of bankruptcy from the time of the first arrest<sup>n</sup>.

<sup>1</sup> Bradford and Bloodworth,  
<sup>2</sup> Keb. 11. <sup>3</sup> Lev. 13. Com.  
Bankt. C. 4.  
<sup>4</sup> Com. Bankt. C. 4.

<sup>1</sup> Co. B. L. 82.

<sup>m</sup> Rose and Green, Burr. 437.

<sup>n</sup> Good. 36.

## CHAP. II.

*Of acts of bankruptcy which relate to dispositions of the trader's effects, and which are considered as fraudulent endeavours to defeat creditors of their legal remedy against his property.*

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1 *Ja. c. 15. s. 2.*

5 *Geo. 2. c. 30. s. 24.*

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THESE are either dispositions by process of law collusively taken out, or dispositions by the party. Of the first kind there is but one described in the statutes; of the latter there are two, and one of which forms a considerable title of the bankrupt law.

BOOK II.  
CHAP. II,  
SECT. I.

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## SECT. I.

*Willingly or fraudulently procuring his goods, money, or chattels, to be attached or sequestered.*

This must be by the procurement of the party, with intent to delay creditors. An *adverse* attachment or sequestration, upon the default or laches of the party, is not within the statute; as where,  
a merchant

BOOK II.  
CHAP. II.  
SECT. I.

a merchant having an impropriate rectory, the tithes were sequestered for not repairing the chancel<sup>a</sup>.

A fraudulent *execution*, though void against creditors, is held not to be within the meaning of the words "*attachment or sequestration*" used in this statute, which are construed to relate only to certain customary modes of proceeding, known by these names, and used in the cities of London, Bristol, and other places<sup>b</sup>. And the case of the sequestration of tithes cited above, seems out of the statute also upon this ground.

#### SECT. II.

*Making or causing to be made any fraudulent grant or conveyance of his lands, tenements, goods, or chattels.*

A grant or conveyance within this statute, must be by *deed*. A fraudulent disposition of property by mere delivery or otherwise, not by deed, though it may be void against creditors, is not an act of bankruptcy in itself<sup>c</sup>. And a fraudulent deed will be an act of bankruptcy, though by reason of the fraud it is void and without operation in other respects<sup>d</sup>.

<sup>a</sup> Stone 124. Good. 29. Com. Bankt. C. 2.

<sup>b</sup> Harman and Spoffwoode, Co. B. L. 97. Clavey and Hayley, Cowp. 427.

<sup>c</sup> Burr. 2174. 2235. 2477. Cowp. 117. 427. 629.

<sup>d</sup> Haffels and Simpson, Doug. 92. Whitwell and Thomson, Esp. N. P. 63.



As to what kind of fraudulent deeds are within the statute, it has been laid down, that any deed fraudulent against creditors within the 13 *Eliz.* c. 5. or as against purchasers within the 27 *Eliz.* c. 4. and every fraudulent deed generally, is in itself an act of bankruptcy<sup>e</sup>: but it has been thought necessary also upon this occasion to attend to the manner in which such transactions are considered in relation to the bankrupt laws.

The great objects of these laws, in the case of a trader's becoming insolvent or endeavouring to defeat his creditors, are to take from him the management and disposal of his property, and to distribute it as equally as possible amongst his general creditors<sup>f</sup>. Any disposition of his property, therefore, whether of the whole or of any part of it, made with a view to defeat these objects, is considered as a fraud upon the bankrupt laws, and as such, if it is by deed, is held to be an act of bankruptcy within this statute.

Whether in any particular case a deed shall or shall not be considered as fraudulent, is a question, upon which, as it must always depend upon the particular circumstances either separately or combined, in each case, from which the fraudulent intent of the party is to be inferred, it is difficult to lay down any precise general rules: but besides the circumstances which afford evidence of fraud

<sup>e</sup> Com. Bankt. C. 8. Good. 92.  
Doug. 1. 92.

<sup>f</sup> 1 P. W. 251. Burr. 476. 829.

generally

BOOK II.  
CHAP. II.  
Sect. II.

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generally in conveyances<sup>s</sup>, such as the deed's being the voluntary act of the party, the transaction being secret, the donor continuing in possession, &c. those from which fraud in relation to the objects of the bankrupt laws have been most commonly inferred are principally, 1. the *extent* of the conveyance, and 2. its being made in *contemplation of bankruptcy*(13).

*Conveyances*

<sup>s</sup> See Twyne's case, 3 Co. 80.

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(13) One might have imagined that the simple description of the act of bankruptcy contained in the statute, namely a *fraudulent* conveyance with intent, &c. to defeat creditors, was meant to apply to cases of actual fraud or deceit practised in the particular transaction. But the construction seems to have been carried further, and it has been said that every case of an act of bankruptcy by deed, proceeds upon the ground of its being a fraud upon the *bankrupt laws*. (Rust and Cooper, Cowp. 629.) And as any conveyance that is considered as a fraud upon the *bankrupt laws*, can only be so considered in respect of its defeating that equal distribution amongst creditors which is provided for by those laws in the event of a *bankruptcy*, (for it is only in that event that such equality either does or can take place), one might have imagined that a deed's being made in actual *contemplation* of that *event*, and for the very purpose of defeating that equality which would be the consequence of it, should have been considered as the essential circumstance in all cases to make any conveyance an act of bankruptcy, as a *fraud upon the bankrupt laws*. But the construction seems, in some cases, to have gone further; and though in several of the cases, where a conveyance of the *whole* or *principal* part of a trader's stock in trade, &c. has been held an act of bankruptcy, it appeared to have been made also in actual contemplation of it; yet in some other cases of that kind,

*Conveyances of the whole.*

BOOK II.  
CHAP. II.  
Sect. II.

A conveyance by a trader of all his effects and stock in trade, by deed, to the exclusion of any one or more of his creditors, has been always held to be a clear act of bankruptcy. Such a conveyance destroys his very capacity of trading, and tends to overturn at once every provision of the bankrupt laws, by investing persons of the party's own choice, with the management and disposal of his property, instead of trustees chosen by his creditors under the direction of commissioners and the superintendence and control of the great seal; and by removing that property out of the reach of his general creditors <sup>h</sup>.

<sup>h</sup> Burr. 829—831. 2240. Cowp. 632.

kind, the fact of the conveyance being made in *contemplation* of bankruptcy, either does not appear, or was not relied upon; but they seem to have been determined, not properly upon an actual fraud in the particular transaction, but upon what may, rather perhaps, be called a metaphysical fraud, namely as a transaction fraudulent against the spirit and policy of the bankrupt laws. I have found it necessary, therefore, to distinguish the circumstance of fraud which arises out of the *extent* of the conveyance, from that of the conveyance being made in *contemplation of bankruptcy*: without which distinction, there would be no difference between the cases of conveyances of the *whole*, and conveyances of *part*, which are all equally acts of bankruptcy, if made in *contemplation* of that event.

1. It



1. It will be an act of bankruptcy, *though made for a valuable consideration*, and therefore not fraudulent as between the parties: for the injury to the rest of the creditors is the same.

Where a trader, therefore, in insolvent circumstances, assigned by deed *all his effects* to a creditor, as a floating security for all sums of money he should advance, and was allowed to continue in possession upon a secret trust to deliver it up some time after, it was held to be a clear act of bankruptcy<sup>1</sup>.

A like determination was made in the case of an assignment, of *every thing the trader had in the world*, to a creditor to secure money really due to him; the trader being insolvent at the time, and going off a few days after<sup>k</sup>. In this case there were also other circumstances of fraud, namely that the assignment was upon the face of it made for an unliquidated demand: there was no counterpart of the deed, and the original remained with the bankrupt; no possession was delivered, only the bankrupt gave a letter of attorney to his own clerk, who was privy to the whole, to collect debts, &c. and the goods still remained in the bankrupt's house; and no notice was given to the debtors.

So in the case of a trader who being arrested by one creditor, and having applied to another to bail him (who refused, without a security also for his

<sup>1</sup> Worley and Demattos, Burr. 467.

<sup>k</sup> Wilson and Day, Burr. 827.

own debt), made a bill of sale to the latter, of *all his goods and effects whatsoever*, to secure his own debt together with that for which he gave bail, subject to a trust, as to the surplus for the bankrupt himself; and possession was given the next day, when the trader committed another act of bankruptcy, and soon after absconded <sup>1</sup>(14).

And where a party conveyed a copyhold (15), and *all his stock in trade and personal estate*, by way of indemnity to one who was only a surety with him in a bond, and a nominal possession was given, but under a proviso that actual possession was not to be taken till default of payment: the surety had neither applied for, nor even knew of the assignment. This was held <sup>m</sup> an act of bankruptcy, though the party was in good credit at the time of executing the deed, and for *several years* after; and that the assignment not being to secure a present debt made

<sup>1</sup> Butcher and Easto, Doug.  
294.

<sup>m</sup> Haffel and Simpson, Dougl.  
28.

(14). The *extent* of the conveyance in this case seems to have weighed against circumstances which might, perhaps, otherwise have been considered as negating any conclusion of fraud. It was made for a valuable consideration, was immediately followed by possession, and executed under the terror of an arrest, and to deliver himself from it.

(15) The court gave no opinion with respect to the copyhold in this case, but see below, p. 55.

no

BOOK II.  
CHAP. II.  
SECT. II.

no difference, as it was to give him a preference when he should become one (16).

2. A colourable *exception* of a small *part* of the estate or effects will not avail to take the case out of the general rule<sup>n</sup>.

A trader finding his circumstances decline, but wishing to prefer some particular creditors, made a bill of sale to them, at midnight, of *all his goods and stock in trade*, including even his sign and sign-iron, but excepting out of it a few particulars of about 100 l. value; and, next morning absconded. This was considered<sup>o</sup>, as in effect, a conveyance of all, the interest omitted being so minute.

A mortgage of (amongst other things) *all the stock in trade*, excepting only the household goods and debts, which were both very trifling, was held to be an act of bankruptcy<sup>p</sup>; as being an assignment of all the stock in trade without which he could carry on no business. In this case the bank-

<sup>n</sup> Exp. Foord, Burr. 477.  
Cowp. 124.

<sup>o</sup> Compton and Bedford,  
Bl. 362.

<sup>p</sup> Law and Skinner, Bl. 996.

(16) It was objected that he to whom this conveyance was made, being only a surety, who had not been called upon to pay, was no actual *creditor* at the time, and therefore it was no *preference*. Though a *preference* of a *creditor* is certainly the most common occasion for such conveyances, would not a conveyance to one who was no creditor at all, be equally within the statute, if it was made to defeat all the creditors?

rupt



rupt carried on his trade with credit for near *two years* after.

BOOK II.  
CHAP. II.  
Sect. II.

Upon the same principle it has been said<sup>q</sup>, that an assignment of so much of a man's stock as to disable him from carrying on his trade would be an act of bankruptcy; or even an assignment of all his *household goods*. And it is reported to have been held<sup>r</sup>, though the accuracy of the report has been since doubted and the position itself contradicted<sup>s</sup>, that any deed, which *ipso facto* created an insolvency, was an act of bankruptcy, (17).

3. A con-

<sup>q</sup> Bl. 442.

<sup>s</sup> Dougl. 91, 92.

<sup>r</sup> Law and Skinner, Bl. 996.

(17) Such very general positions as this, and the others alluded to above, however loose they may appear to be, and fallacious, as they certainly are, seem to have been not unfairly deducible from the general reasoning employed, with respect to conveyances of the whole being acts of bankruptcy, as destroying the capacity to trade. For if either the evidence of some specific fraud in the particular transaction, or of that fraud upon the bankrupt *laws* which is supposed to be committed in the case of a deed made in contemplation of bankruptcy, was not to be considered as *essential* in all cases; but the general constructive fraud only, inferred from an act destroying the capacity to trade, was to be considered as sufficient, it could hardly fail to lead to some uncertainty of conclusion, as to what *extent* of conveyance might or might not be an act of bankruptcy upon such a principle.

In the case of Walker and Burrows, 1 Atk. 93. where a trader had assigned to his son, *all his shop and household goods*, Lord Hardwicke took no notice whatever of the circumstance

BOOK II.  
CHAP. II.  
Sect. II.

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3. A conveyance of all, though for the *payment of creditors generally*, is fraudulent and an act of bankruptcy, if *any one* creditor is excluded: or to pay all creditors rateably, unless *all* the creditors assent<sup>1</sup>.

*Conveyances of part.*

As a trader must frequently have occasion, in the ordinary course of business, to make over parts of his effects, by deed or otherwise, to particular creditors, either as a security for debts before contracted or for future advances, it is perfectly obvious that a conveyance by a trader of part of his effects to a particular creditor, unlike in this respect to a conveyance of the whole, carries in itself no evidence whatever of fraud of any kind. But when such a conveyance is made *in contemplation* of bankruptcy, though it is to a *bonâ fide* creditor, it is

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<sup>1</sup> Exp. Foord, Burr. 477. N. P. 40. Burr. 2240. Cowp. Kettle and Hammond, Bull. 123. 632.

of the *extent* of the conveyance, but established the assignment, because there was neither any actual fraud in the transaction, the assignment having been made for a valuable consideration, and followed immediately by the possession of the son; nor any constructive fraud upon the bankrupt laws, it having been made several *months* before the bankruptcy.

considered as a fraud upon the creditors at large, as giving some one or more of them a preference which is contrary to the spirit and policy of the bankrupt laws; and is therefore not only void as against creditors generally, but if by deed, is an act of bankruptcy in itself.

BOOK II.  
CHAP. II.  
Sect. II.

Where, therefore, an insolvent trader, of his own voluntary act, being neither arrested, nor threatened with an arrest, nor even called upon for the money, assigned a third part of his effects to his brother in consideration of a sum of money advanced from motives of friendship, and in two days after absconded: this, although possession was delivered instantly, and several acts of ownership exercised *bonâ fide* by the brother who had no knowledge or suspicion of the trader being insolvent, was held clearly an act of bankruptcy, being a voluntary preference given in immediate contemplation of it<sup>u</sup>.

In like manner, where one unable to pay above eight shillings in the pound, and threatened with an attachment for non-payment of money under a decree of the court of chancery, and having agreed that a commission should be taken out against him, assigned a lease, to secure some particular creditors, and then in trust for himself. This was held to be an act of bankruptcy: 1. as a fraud upon the creditor under the decree; 2. as a fraud upon the

<sup>u</sup> Linton and Bartlett, Cowp. 120. 3 Will. 47.



BOOK II.  
CHAP. II.  
Sect. II.

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general creditors, being done in contemplation of bankruptcy. It was a preference merely voluntary, the assignees of the lease not having applied to him<sup>\*</sup> for the payment of the debt<sup>\*</sup>.

So, of an assignment of part of the real and personal estate of a trader, only three days before he absconded, to his son who was a creditor for more than the value of the estates<sup>†</sup>.

But on the other hand, although a party be insolvent at the time of the conveyance, or become so soon after; and though in the event it may defeat that equality amongst creditors, to secure which is so great an object of the bankrupt laws; or though (in the language commonly used upon this subject) it may operate as a *preference* of a particular creditor; yet if the conveyance is not the mere voluntary act of the party, as in that case it cannot be said to be done with *intent* to defeat creditors, the preference as it is called, being only *consequential*, it will not be held fraudulent or an act of bankruptcy.

As, where it is given in order to deliver the party from legal process, or from the threat and apprehension of it<sup>‡</sup>: or even from the pressure and importunity of a creditor without the threat, or actual apprehension of an arrest<sup>§</sup>. It was for a reason of

<sup>\*</sup> Devon and Watts, Dougl.  
88.

<sup>†</sup> Round and H. Hyde, Co.  
B. L. 91.

<sup>‡</sup> Cowp. 123. 634. Burr. 2240.

<sup>§</sup> Smith and Payne, 6 T. R.  
152.

this kind partly, that Ld. Mansfield supposed the deed in the case of *Jacob and Shepherd* was found not to be fraudulent or an act of bankruptcy: one ground on which it was sought to be set aside in equity, being that of *fraud and imposition* upon the *bankrupt himself* <sup>b</sup>.

Or, if it is done in pursuance of some prior agreement. The same learned judge conceived it might be on this ground amongst others that the conveyance in the case of *Small and Oudley* was sustained; it being given at the very time when the party had by his note undertaken to replace the stock, the loan of which was the consideration of the conveyance <sup>c</sup>.

Or where the act is in itself right to be done, and such as a court of equity would have compelled the party to do: as, where a mother, a short time before her becoming insolvent through the bankruptcy of a near relation whom she endeavoured to save by a speedy supply of a large sum of money, before she did so, executed a deed declaring the trust of some money in her hands belonging to her children, to whom she had been left guardian <sup>d</sup>.

And it may be observed in general, that in all cases of this kind, which turn upon the fraudulent intent of the party, the following circumstances, though with respect to some of them it is impossible

<sup>b</sup> Burr. 478.

Mod. 489. Burr. 478. Cowp.

<sup>c</sup> Burr. 480.

123. 125.

<sup>d</sup> Cock and Goodfellow, 10

BOOK II.  
CHAP. II.  
Sect. II.

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to draw any precise line, must always be considered at least as favourable; and according as the particular case turns upon a single circumstance of fraud or upon several taken together, will have more or less weight in the general determination.

As, namely, where the party continues in good credit, and a bankruptcy does not take place till some time after the conveyance<sup>e</sup>.

Or where the transaction is beneficial to the general creditors<sup>f</sup>.

Or where the possession is delivered immediately<sup>g</sup>. And with respect to this, although the non-delivery of possession, particularly in the case of goods and chattels, is commonly considered as a badge of fraud, yet it will not be so, in cases where the best delivery is given that the nature and circumstances of the property will admit. Where, therefore, the goods which were the subject of a conveyance, were before and at the time of executing the conveyance, already on the premises of the creditor, there the mere transfer of the *property*, by the execution of the conveyance, with a *nominal* delivery of the possession, was held to be sufficient<sup>h</sup>.

<sup>e</sup> Cock and Goodfellow, Burr. 478. Jacob and Shepherd, ib. Unwin and Oliver, Burr. 481. Walker and Burrows, 1 Atk. 93.

<sup>f</sup> Small and Oudley, Burr. 480. 2240. Manton and Moore, 7 T. R.

<sup>g</sup> Jacob and Shepherd, Small and Oudley, Unwin and Oliver.

<sup>h</sup> Manton and Moore, 7 T. R. 67.



A conveyance of *copyhold*, though fraudulent, is held not to be within the statute, because creditors cannot take copyhold in execution<sup>1</sup>(18).

BOOK II.  
CHAP. II.  
SECT. II.

A conveyance must be fraudulent at the execution of it, subsequent circumstances will not make it so<sup>k</sup>. And a deed made *bonâ fide* before the party entered into trade, which if it had been made after, might have been fraudulent, will not be considered as fraudulent afterwards upon his becoming a trader<sup>l</sup>.

Before concluding this subject of acts of bankruptcy by deed, it may be proper to notice two cases in which a conveyance by deed of part of a trader's effects, made when the party had a bankruptcy in immediate contemplation, was held not to be an act of bankruptcy. These are the cases of *Small and Oudley*, and *Hooper and Smith*.

But in the former<sup>m</sup> the conveyance was no fraud upon the general creditors, but beneficial to

<sup>1</sup> Exp. Cockshott, 3 Bro. 502.

548. Lily and Osborn, 3 P. W. 298.

<sup>k</sup> Good. 92. Stone and Grubham, 2 Bulstr.

<sup>m</sup> Small and Oudley, 2 P. W.

<sup>l</sup> Crisp and Pratt, Cro. Ch.

427. and see Burr. 480. 2240. and Cowp. 633.

(18) This is considering this act of bankruptcy as founded upon the attempt to defeat creditors of their legal remedy against the effects; but if the principle of *frauds* upon the bankrupt *laws* were adhered to, such a conveyance might as much as any other be an act of bankruptcy upon that principle, it being as much a fraud of that kind, as a conveyance of any other property, copyhold being equally the subject of distribution by those laws.

BOOK II.  
CHAP. II.  
Sect. II.

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them, and the fraud, if any, could only be upon the creditor himself to whom the conveyance was made. It was given too at the very time the trader had agreed to replace some stock which was the consideration of the conveyance; and there was no pretence that the creditor allowed him to continue one moment in possession. Supposing, on the other hand, that the deed had been fraudulent, yet it is to be considered, that the question upon it arose in a court of equity, and that there Sir J. Jekyll established it, because he thought himself bound by a recent decision of Ld. King's, that a court of equity could not decree the deed fraudulent, unless it had been found so at law; and upon an issue directed to try the time of the bankruptcy, the jury had not found the party a bankrupt, by the execution of the deed in question, but by a different act at a different time.

The other case<sup>n</sup> was that of a trader, who being in declining circumstances, *assigned* to his mother, a *bonâ fide* creditor, half his stock in trade, and made out a bill of parcels and receipt, with discount as for prompt payment, as if they had been sold in the ordinary course of business. In the evening of the *same day* he had a meeting with his principal creditors, when it was agreed he should commit an act of bankruptcy; which was done, and a commission taken out. This was ruled at *Nisi Prius* not to be fraudulent. But it may fairly be questioned whether this would

<sup>n</sup> Hooper and Smith, Bl. 441.

be so determined at this day. It was clearly a fraud, though a *pious* one. It is also to be considered, that this was a case of a *concerted* act of bankruptcy; and it does not clearly appear by the report, whether it was not upon that ground that the case was really decided.

SECT. III.

*If a bankrupt after the issuing of a commission against him, pay to the petitioning creditor, or deliver to him goods or other satisfaction, or security for his debt, whereby he shall privately have more in the pound than the other creditors.*

Though the statute only speaks of compromises after the *issuing* of a commission, it is held to extend to the case where nothing further is done than *striking a docquet*: for all the mischief follows immediately upon striking a docquet, by which the parties prevent any other creditor from taking out a commission, and gain to themselves so many days to traffic<sup>o</sup>.

And even to the case of striking a docquet, where nothing *could* be done upon it further, the party being in a mistake as to the supposed act of bankruptcy on which he had proceeded<sup>p</sup>.

The very purpose of striking a docquet is to prevent the bankrupt from wasting his effects in the mean time<sup>q</sup>.

<sup>p</sup> Exp. Gedge, 3 Vez. J. 349.

<sup>p</sup> Exp. Thomson, 1 Vez. J. 157.

<sup>q</sup> Ibid.



## CHAP. III.

*Of acts which relate to the circumstances or credit of the bankrupt.*

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21 Ja. c. 19. s. 2.

4 Geo. 3. c. 33. s. 1.

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## SECT. I.

BOOK II.  
CHAP. III.  
Sect. I.

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*BEING arrested for debt, lying in prison two months or more upon that or any other arrest or detention in prison for debt; shall be accounted a bankrupt from the time of his first arrest.*

1. With respect to the debt.

The statute expressly requires a lying in prison upon an arrest or detention for *debt*, and the ground on which it is supposed to have made this an act of bankruptcy, is the presumption it affords of the party's insolvency. Being committed therefore in execution of a criminal sentence, and in the course of that commitment, being charged with debts and remaining charged with them two months or more, after the expiration of the sentence, seems not to be within the statute<sup>a</sup>: which seems to require that

<sup>a</sup> Exp. Bowes, 4 Vez. J. 168.

the

the imprisonment should be originally *founded* upon debt, as well as continued upon that account.

BOOK II.  
CHAP. III.  
SECT. I.

The arrest must be for a debt by contract, and not a debt by reason of a fine, amercement, &c. <sup>b</sup>

It must also be a debt at law, and on which the party is actually suable at the time. Lying in prison on an arrest for a demand, for which the remedy is only by bill in equity for a specific performance, is not a sufficient ground for a commission <sup>c</sup>. Lying in prison on an arrest upon a bond before the day of payment, in order to oblige the party to find sureties according to the custom of London, seems to be no act of bankruptcy, for in that case no debt is actually then due <sup>d</sup>.

The party arresting also, must be regularly entitled to sue. Lying in prison on an arrest by an executor before probate, has been held not to be within the statute <sup>e</sup>.

2. With respect to the *computation* of the *time*.

The two months are computed from the time of the first arrest, only where the party *lies in prison* immediately upon the arrest. Where bail is *fairly* put in, and the party at a future day surrenders in discharge of his bail, the two months are computed, not from the time of the first arrest, but from the time of the surrender <sup>f</sup>; for the presumption of

<sup>b</sup> Good. 25, 26.

<sup>c</sup> Exp. Hylliard, 1 Atk. 147.

<sup>2</sup> Vez. 407.

<sup>d</sup> Good. 25. and see Co. B. L. 94.

<sup>e</sup> Duncombe and Walter, 3 Lev. 57.

<sup>f</sup> Duncombe and Walter, 3 Lev. 57. 1 Ventr. 370. Th. Ray. 479. Skinn. 22. 87. Sho. —. Came and Coleman, Salk. 109. Hill and Siff, 2 Sho. 512. Tribe and Webber, Dav. 376. Rose and Green, Burr. 437.

insolvency

BOOK II.  
CHAP. III.  
Sect. I.

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insolvency arises not from the mere circumstance of being arrested, which may happen to the most substantial trader, but from the lying in prison two months without being able to find bail<sup>g</sup>.

But if the bail is a mere matter of *form*, and put in without justification, only for the purpose of turning the party over from one custody to another, that is not considered as a being out of custody, but is a continuation of the *same* imprisonment within the meaning of the statute, and has relation to the first arrest<sup>h</sup>.

Where a party arrested and in prison at the suit of one plaintiff, is detained at the suit of another, and lies two months at the suit of the second, though discharged as to the first, this is equally within the statute: the words of the act being “if he lie in prison two months upon *that or any other* arrest, or *detention* in prison for *debt*, &c.”<sup>i</sup>

Although as soon as the two months expire, the act of bankruptcy relates back to the time of the arrest, as if that had been in itself the act of bankruptcy, the reason of which seems to be that the lying in prison two months is a strong presumption that the party was insolvent at the very time of the arrest<sup>k</sup>; yet a commission taken out before the two months expire, cannot be sustained, for the act of bankruptcy is only inchoate upon the arrest, and is

<sup>g</sup> 2 Bl. Com. 478. Lev. Vent. Burr. ut supra.

<sup>h</sup> Rose and Green, Burr. 437.

<sup>i</sup> Coppendale and Bridgen, Burr. 814.

<sup>k</sup> Burr. 818, 19.



not complete till the expiration of the two months<sup>1</sup>.  
 Ld. Raymond is said to have held otherwise<sup>m</sup>, but  
 probably he is misreported (19).

BOOK II.  
 CHAP. III.  
 Sect. II.

SECT. II.

*Neglecting to make satisfaction for any just debt to  
 the amount of £. 100 within two months after personal  
 service of summons for such debt, upon any trader  
 having privilege of parliament.*

For the honour of parliament, there is no case  
 upon the subject.

<sup>1</sup> Smith and Stracy, Salk. 111.  
 Com. Bankt. C. 1.

<sup>m</sup> Beawes L. M. 518.

(19) The two months, according to the common rule, ought to  
 be two lunar months, or 56 days. But this relation is considered as  
 of an odious nature; (Clarke and Ryall, Bl. 642.) and *Qu.* whe-  
 ther Ld. Mansfield had not some doubt on this point in the  
 case of *Coppendale* and *Bridgen*. There, the party was arrested  
 the 2d of May, and was charged in custody with another action  
 on the 4th of May. He was discharged of the first action upon  
 the 2d of July, but continued in prison upon the second till  
 the 6th of July. Ld. Mansfield said, "here was plainly an act  
 of bankruptcy on the 4th of May, whatever dispute there might  
 be made about one on the 2d of May." Yet if the computation  
 was by lunar months, there could be no dispute in either case:  
 there being, from the 2d of May to the 2d of July, four days,  
 and from the 4th of May to the 2d of July, two days more  
 than two lunar months, exclusive, in each case, both of the day  
 of arrest or detention, and of the day of the discharge.

## CHAP. IV.

*Of acts of bankruptcy generally.*

## SECT. I.

*Of the place where committed, and of the time in relation to the trading.*

BOOK II.  
CHAP. IV.  
Sect. I.

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AN act of bankruptcy, especially under the older statutes, being in the nature of a crime, and that a crime of positive institution, must evidently be considered as of a local nature, and confined within the same limits as the peculiar law which has given rise to it. No act therefore done out of England can be an act of bankruptcy; whether the trader be a native or a foreigner<sup>a</sup>. A deed, which executed here, might be an act of bankruptcy, is not so if executed in India<sup>b</sup>. A fraudulent out-lawry suffered in Ireland does not make one a bankrupt here; but in any part of the territory of England, though under a peculiar jurisdiction, it does; as in the county palatine of Durham<sup>c</sup>.

With respect to the time in relation to that of the trading; though a party leaves off trade, he may afterwards commit an act of bankruptcy in

<sup>a</sup> Cowp. 401. and Exp. Smith.  
<sup>b</sup> Ibid.

<sup>c</sup> Com. Bankt. C. 4.

<sup>b</sup> Inglis and Grant, 5 T. R.

respect of creditors, whose debts were either contracted during the trading, or contracted before, and were subsisting debts while he was in trade<sup>d</sup>.

BOOK II.  
CHAP. IV.  
Sect. II.

SECT. II.

*Of concerted acts of bankruptcy.*

When it is recollected that to almost every act of bankruptcy, the *intent to defraud* or delay creditors is required, it may seem surprising that an act committed by concert and contrivance with creditors themselves, should ever, as against third persons, have been considered as an effective act of bankruptcy. It is said, however, to have been so held in one case<sup>e</sup>; but that seems to have been contrary to former determinations<sup>f</sup>, and it is now settled by a variety of cases since, that it shall be of no avail against persons not privy or consenting to it<sup>g</sup>, and that those who assented to it shall not be allowed to set it up as an act of bankruptcy against them<sup>h</sup>. But the bankrupt himself, and all those coming in under the commission are concluded from saying any thing against it<sup>i</sup>; and it was upon

<sup>d</sup> Penriz and Daintry, Sid. 411. Heylor and Hall, Palm. 325. Meggott and Mills, Ld. Raym. 287.

<sup>e</sup> Bramley and Munde, Bull. N. P. 39.

<sup>f</sup> Field and Bellamy, *ibid.*

<sup>g</sup> Hooper and Smith, Bl. 441.

Allan and Hartley, Co. B. L. 5. Cawley and Hopkins, *ibid.* 31. Roberts and Teasdale, Peake 27. and Bolton and Reichard, Esp. N. P. 107.

<sup>h</sup> Bamford and Baron, 2 T. R. 594. Eyre and Birbeck, *ibid.*

<sup>i</sup> Hooper and Smith, Bl. 441.

that



BOOK II.  
CHAP. IV.  
SECT. III.

---

that ground probably, that the case of *Bramley* and *Mundee* was really decided <sup>k</sup>.

#### SECT. III.

##### *Of avoiding or purging an act of bankruptcy.*

Where an act is dubious or equivocal, circumstances may explain it, and shew it not to have been done with *intent* to defeat creditors; but an act, once committed, plainly and directly with that intent, can never be purged or explained away by any thing done afterwards <sup>l</sup>: unless a man pays off or compounds with all his creditors, in which case he becomes, as the phrase is, a new man <sup>m</sup>.

#### SECT. IV.

##### *Of the construction of the statutes with respect to acts of bankruptcy generally.*

The bankrupt laws, having expressly defined the several acts of bankruptcy; being an innovation upon the common law; and in many instances penal in their operation, considering the several acts as acts of fraud; are not to be extended or multiplied by any construction or implication <sup>n</sup>.

Therefore a man's clandestinely removing goods from his house, and privately concealing them in

<sup>k</sup> Bull. N. P. 40.

<sup>l</sup> Hopkins and Ellis, Salk.  
310. Burr. 484. Colkett and

Freeman, 2 T. R. 59. 2 Bl. Com.  
485, 486.

<sup>m</sup> Salk. *ibid*.

<sup>n</sup> 2 Bl. Com. 479.

order to preserve them from being taken in execution, was held no act of bankruptcy: for the statutes as to this point mention only fraudulent gifts to third persons, and procuring them to be seized by sham process; but this falls within neither of those cases.

Nor stopping, or refusing payment: nor, if in consequence of such refusal, the party is arrested, but puts in bail: nor even if he goes to prison, unless he lie there two months, or escape from it after an arrest for £. 100 or more (20).

Nor giving a fraudulent preference, by delivery of property to a particular creditor, if it is not by deed: though it is void against creditors.

And a deed, which if fraudulent, would be an act of bankruptcy, cannot be decreed fraudulent in a court of equity, unless found so at law: there cannot be an equitable bankruptcy.

° Cole and Davies, *Ld. Raym.* 9 2 P. W. 429. Burr. 479.  
725. 481, 482. 2 Vez. 19.  
P Hopkins and Grey, 7 Mod.  
139.

(20) It is not an *act* of bankruptcy, it is said, (Co. B. L. 100.) for the party to give money for notice when a writ should come into the sheriff's office against him. It seems difficult to conceive, that it should ever have been imagined to be one.

It is not even any *proof* of an act of bankruptcy (Croxtan and Hodges, Bull. N. P. 40.), in the sense of direct or full proof. It is only *evidence* of the *circumstances* of the party, which may explain his *intent* in doing something else that is alleged to be an act of bankruptcy; as in the cases of departure, keeping house, &c.

## BOOK THE THIRD.

*OF THE COMMISSION, AND PROCEEDINGS  
UNDER IT.*BOOK III.

COMMISSIONS are called separate or joint, according as they are issued against a single person, or against two or more being partners; and partners are liable either to a joint commission against all, or to separate commissions against each separately. At present, I shall consider only separate commissions against persons not being partners, or only what is common to all sorts of commissions, and shall reserve the consideration of what is peculiar to commissions against partners, whether jointly or separately, for a future place. In the principal outlines of the following part of this work, I shall pursue such a division of the subject as naturally presents itself in the ordinary course of the proceedings in a commission, as perhaps not the worst in any view, and in a practical view obviously the best.



## CHAP. I.

*Of suing out the commission.*13 *Eliz. c. 7. f. 2.*1 *Ja. c. 15. f. 3.*21 *Ja. c. 19. f. 3. 15.*7 *Geo. c. 31. f. 1. 3.*5 *Geo. 2. c. 30. f. 22, 23.*4 *Geo. 3. c. 33. f. 3.*

ON the petition of a creditor, who has made an affidavit of a debt to a certain amount, and given a bond to the great seal for duly proceeding in the commission(21); and which must be executed by the creditor himself, and therefore an *infant* cannot be a petitioning creditor<sup>r</sup>; the Lord Chancellor, &c. is empowered and authorized to issue a commission of bankrupt, and is bound to grant it, as a matter of right, a commission being, it is said, as much *ex debito justitiæ* as a writ<sup>s</sup> (22).

BOOK III.  
CHAP. I.

It

<sup>r</sup> Exp. Barrow, 3 Vez. J. 554:<sup>s</sup> 1 Atk. 218.

(21) Which is called striking a docquet.

(22) At the same time the practice of entering caveats to prevent the issuing of commissions, which prevailed till Ld. Hardwicke expressed his disapprobation of them, 1 Atk. 72. as giving opportunity

It is said to have been held<sup>u</sup> that the old acts did not require that the person applying for a commission should be a creditor (23), or that he should make proof of a debt to any certain amount; and though such proof was frequently required before granting a commission, this, it was said, was only a matter of discretion in the Chancellor.

But since (the 5 *Ann.* c. 22. now expired, but of which the provisions in this respect were re-enacted by) the 5 *Geo.* 2. no commission can issue unless upon the petition of a creditor, to whom the bankrupt owes a debt to a certain amount.

<sup>u</sup> Smith and Blackman, *Ld. Raym.* 724.

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to bankrupts to make away with their effects, shews that a commission had not always been considered, in the first instance, as quite so much a matter of course, as a writ. After the 5 *Anne*, however, and the 5 *Geo.* 2. which made such special provisions for preventing commissions being taken out maliciously, the case was certainly very different from what it was under the old acts, which required neither affidavit of debt, or bond to the great seal.

(23) This is now a matter of no consequence, but it may be observed that the statute of *Eliz.* required a *complaint* in writing; and a *complaint* by any other than a *creditor* implies a manifest absurdity: so manifest that in the 5 *Geo.* 2. the legislature has not thought it necessary distinctly to say no commission shall issue, unless upon the petition of a *creditor*; but only that no commission shall issue upon the petition of a creditor, unless his *debt*, &c.

SECT. I.

BOOK III.  
CHAP. I.  
Sect. I.

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*Of the amount of the petitioning creditor's debt.*

The statute requires that the debt of a single creditor, or of two or more being partners, shall amount to £.100; that the debt of two shall amount to £.150; and of three or more, to £.200.

If the debt as against the bankrupt amount to the sum required, it is not material though the creditor should have acquired it for less; as where an indorsee of the bankrupt's notes bought them in at an under value; he was held a legal creditor for the full sums contained in the notes<sup>\*</sup>.

If a creditor to the full amount, before an act of bankruptcy committed, receives, after notice of the bankruptcy, a part of his debt, the payment being illegal cannot be retained, and the original debt remains in force and will support a commission. At least, the creditor suing it out on the ground that his whole demand was unpaid, will not be permitted afterwards to say the payment was a good one<sup>z</sup>.

<sup>\*</sup> Exp. Lee, 1 P. W. 783. Exp. Marlar, 1 Atk. 150.

<sup>z</sup> Man and Shepherd, 6 T. R. 680.



*Of the nature and ground of the debt.*

It must be a debt *at law*. No debt *in equity* will support a commission<sup>a</sup>; and if a legal demand is not in its nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor: as the assignee of a bond<sup>b</sup>.

But if a creditor for a debt at law, has the *body* of his debtor *in execution*, he cannot at the same time sue out a commission upon it; for the body of the debtor being in execution, is, in point of law, a satisfaction of the debt<sup>c</sup> (24).

A debt

<sup>a</sup> Exp. Hillyard, 2 Vez. 407.  
S. C. 1 Atk. 147.

<sup>b</sup> Exp. Lee, 1 P. W. 783.  
Medlicot's case, Str. 899.

<sup>c</sup> Burnaby's case, Str. 653.  
Cohen and Cunningham, 8 T.  
R. 123. but Exp. Burchall,  
1 Atk. 141. and S. C. Dav. Bt.  
Law 15. contra.

(24) As a creditor who has taken the bankrupt in execution, before the commission, is allowed to come in under the commission, abandoning his execution, why should not he be allowed to take out a commission upon the same footing? At least the principle of the *debt* being *satisfied*, applies equally to both.

In the case of Cohen and Cunningham, by which the authority of Burnaby's case has been confirmed; it seems to have been supposed that the cases of Burchall and Burnaby might be found to be not irreconcilable, inasmuch as it was said not to be clear, that in Burchall's case, the execution was not *after* the commission. But from the report in Davis (and which is very distinct and circumstantial), it is perfectly clear that it was  
*before*

A debt upon an *unliquidated account* is a foundation for a commission<sup>d</sup>; provided the creditor can swear to a balance amounting to the sum required. Or upon a *solicitor's bill*, though referred to be taxed, and all proceedings at law to be staid in the mean time: the suing out a commission in such a case being no contempt, nor the order to stay proceedings at law a cause for superseding the commission; for that relates only to the bringing of actions and the common and ordinary proceedings.<sup>e</sup> Or a sum awarded by arbitrators; though a bill is filed to set it aside. It is a debt at law which binds the parties till actually set aside, and filing a bill for that purpose is no foundation to suspend it<sup>f</sup>.

The debt of a *surety* is sufficient to support a commission against him<sup>g</sup> (25): a trader being trusted

<sup>d</sup> Flower and Herbert, 2 Vez.

<sup>f</sup> Exp. Lingood, 1 Atk. 240.

327.

<sup>g</sup> Heylor and Hall, Palm. 325.

<sup>e</sup> Mosel. 27.

Denham's case, Stone 183.

before the commission: the report stating, that "Burchall was arrested and charged in *execution* at the suit of Tribe; where he continued *several months*; and some time *afterwards*, Tribe applied for a commission." Burchall preferred his petition (in the nature of a caveat) against it, (but upon another ground) on hearing which, Ld. Hardwicke ordered that Tribe should be at liberty to *sue out* a commission, and which was sued out accordingly; and *after* it had been *proceeded in*, he was ordered to discharge the bankrupt, on electing to seek relief under the commission.

(25) This, however, it should seem, could only be where either he is bound absolutely along with the principal; or if conditionally,

BOOK III.  
CHAP. I.  
SECT. II.

trusted upon the credit of his stock and dealings, as well where he is surety, as where he contracts for his own debt.

The *executor* of a bankrupt, cannot sue out a commission, upon a *debt due to his testator* before his bankruptcy: such a debt vesting in the assignees, and not in the executor, unless the commission was superseded<sup>h</sup>.

The *husband alone* cannot sue out a commission upon a debt due to the wife *as executrix or administratrix*, for he cannot make oath of it as a debt due to himself<sup>i</sup>.

#### SECT. III.

#### *Of the time when contracted.*

##### 1. In respect of the *trading*.

Not only a debt contracted while the party is in trade, but also a debt subsisting while in trade, though contracted before he entered into it, will support a commission; but a debt contracted after his quitting trade, will not<sup>k</sup>.

But a simple contract debt contracted while in trade, will not, by the party's giving a bond for it

<sup>h</sup> Exp. Goodwin, 1 Atk. 100.

<sup>k</sup> Palm. 325. Vent. 5. Ld.

<sup>i</sup> Exp. Stapley, 7 Vin. 67.  
Master and Winter, Dav. 464.

Raym. 287. Butcher and Easto,  
Doug. 295.

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ditionally, and only on default of the latter, then that default has actually been made; otherwise the debt would be contingent.  
after



after leaving off trade, be so far extinguished as to prevent a commission being founded on it<sup>1</sup>. If a trader indebted in £.100, quit his trade, and afterwards become indebted to the same creditor in £.100 more, and then pays £.100, without expressing on what account, the creditor will not be permitted to take out a commission upon the old debt<sup>m</sup>; for without special directions, as to the application of the money paid, it will be presumed to be applied to pay off the old debt first<sup>n</sup>.

2. In respect of the *act of bankruptcy*.

The debt must be contracted *before* the bankruptcy<sup>o</sup>; for as the assignment under the commission, avoids by relation, all *mesne* acts of the bankrupt, the debt also of the petitioning creditor must be thereby avoided, and which would subvert the very foundation of the commission. The only case which might seem an authority against this<sup>p</sup>, was decided upon the old statutes, which did not require the petition of a creditor, and would not have been determined as it was, if it had been after the 5 Geo. 2. which does require such a petition<sup>q</sup>.

Debts contracted before, but not payable till a future day, which happens after the bankruptcy,

<sup>1</sup> Daw and Holdsworth, Peake 64.

<sup>m</sup> Meggott and Mills, Ld. Raym. 287.

<sup>n</sup> Daw and Holdsworth, Peake 64.

<sup>o</sup> Toms and Mytton, Str. 744. Ambrose and Clendon. ib. 1042. Ca. temp. Hardw. 267.

<sup>p</sup> De Golls and Ward, Forr. 243. 4 Bro. P. C. 327. -

<sup>q</sup> Dav. 308. Exp. Wainman, Co. B. L. 21.

BOOK III.  
CHAP. I.  
Sect. III.

it was formerly held, could not support a commission before the day of payment<sup>r</sup>: and the 7 Geo. which allowed such debts to be *proved*, yet declared that no commission should be taken out upon them; nor was this remedied till the 5 Geo. 2. which enables creditors by *bond, bill, note, or other personal security* for money payable at a future day, to take out a commission before the day of payment.

These statutes have been supposed to extend only to securities in writing<sup>s</sup>: yet in some late cases at *Nisi Prius*, Lord Kenyon is said to have expressed an opinion that they extend to the case of sales of goods upon *credit* merely, and to all debts whatever payable at a future day certain<sup>t</sup> (26).

A creditor by bill or note *made* by the bankrupt before an act of bankruptcy, but not *indorsed* to the holder till *after*, is allowed to be a petitioning creditor. This is a case in which the law allows the assignment of a chose in action; the assignee relates to the original debt, and the assignee stands in the original creditor's place<sup>u</sup>. For the same reason, a creditor may, to a debt due to him-

<sup>r</sup> Exp. Mackerness, 1 P. W. 260. Exp. James. ib. 610.

<sup>s</sup> Exp. E. J. C. 2 P. W. 396.

<sup>t</sup> Cockran and Love, Co. B. L. 18. Henbest and Brown, Peake 54.

<sup>u</sup> Exp. Thomas, 1 Atk. 73. Anon. 2 Willf. 135. Bingley and Maddison, Co. B. L. 19.

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(26) The enumeration in the statute is "bills, bonds, notes, or other personal securities, *promises, or agreements.*" The latter words do not seem necessarily to imply writing.

self before, tack a note of the bankrupt indorsed to him after the bankruptcy, to make up the sum required by the statute<sup>x</sup>: it being sufficient within the words of the statute, that there is an existing debt (of the requisite amount), in the *person* of the petitioning creditor at the *time* he *petitions*.

If a creditor takes a bill after an act of bankruptcy for a debt contracted before, drawn by the bankrupt upon one who had no effects in his hands at the time, or previous to the bill's becoming due, the original debt is not extinguished by want of notice to the drawer, of the bill's being dishonoured, and is sufficient to support a commission. Want of notice, though in general tantamount to payment, is not so in this case; for having no effects in the drawee's hands, he cannot be injured<sup>y</sup>.

Taking a security of a higher nature after the bankruptcy, for a debt of an inferior nature contracted before, does not so far extinguish the original debt, as to prevent the creditor from suing a commission upon it; as in the case of a bond taken for a simple contract debt<sup>z</sup>. The creditor's taking a higher security is an extinguishment only as to the *party*; but with regard to the *commission*, he is still considered as a simple contract creditor; all creditors being upon an equal footing, under a

<sup>x</sup> Glaister and Hewer, 7 T. R. 498.

<sup>z</sup> Ambrose and Clendon, Str. 1042. Ca. temp. Hardw. 267.

<sup>y</sup> Bickerdike and Bollman,

<sup>1</sup> T. R. 405.

commission,



BOOK III.  
CHAP. I.  
SECT. III.

commission, without respect to the different natures of their respective securities.

3. In respect of the statute of *limitations*.

A debt at law, notwithstanding the statute has attached upon it, will support a commission. This is without doubt as against third persons, or against the bankrupt himself where he acquiesces in the commission<sup>a</sup>. The 5 Geo. 2. requires no affidavit as to the time, but only as to the truth and reality of the debt: and the statute of limitations relates only to remedy by action, but does not extinguish the debt, or take away any other remedy. But it seems to be taken for granted that the bankrupt himself may take advantage of such an objection, and oppose the commission on that ground<sup>b</sup> (27).

<sup>a</sup> Quantock and England, 746. Fowler and Brown, Co.  
Burr. 2628. S. C. Bl. 702. B. L. 11.  
Swayne and Wallinger, Str. <sup>b</sup> Burr. *ibid*.

(27) Qu.

## CHAP. II.

*Of opening the commission.*13 *Eliz. c. 7. s. 2.*1 *Ja. c. 15. s. 17.*21 *Ja. c. 19. s. 8.*5 *Geo. 2. c. 30. s. 1, 2, 14, 26, 43, 44.*

## SECT. I.

*Of declaring the party bankrupt.*

**W**HEN the commissioners have received proof of the petitioning creditor's debt, the trading, and the act of bankruptcy, they declare and adjudge him a bankrupt, generally, before the date and suing forth of the commission, without specifying the time more precisely (28). This declaration upon their part is merely discretionary and for caution, the statutes having nowhere directed them to make it, and is not ultimately binding upon any body<sup>a</sup>.

BOOK III.  
CHAP. II.  
Sect. I.

<sup>a</sup> Forr. 184. Good. 36. 48.

(28) This has been sometimes misunderstood, as applying to the *depositions* of the *witnesses* to the time of the act of bankruptcy, instead of the *declaration* of the *commissioners*. Doug. 259.

SECT.

*Of the seizure of the property, &c.*

They are authorized, at the same time, to issue a warrant under their hands and seals, for the seizure of all his effects, books, papers, or writings in his custody or possession (29); and for that purpose to enter, and in case of resistance, to break open the houses or other places belonging to the bankrupt, where any such effects, &c. are, or are suspected to be; but they cannot break open any but the bankrupt's house<sup>b</sup>.

Where a messenger, under this warrant, attempts to seize the bankrupt's goods in the possession of other persons, who refuse to deliver them, it seems doubtful how far the court of Chancery will inter-

<sup>b</sup> 2 Show. 247.

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(29) As to the seizure of effects, papers, &c. of the bankrupt in possession of *other* persons, the words of the 5 Geo. 2. c. 30, s. 14. seem to limit it to the case of "other *persons in prison*." The words are "in the custody or possession of such bankrupt, *or* of any other person or *persons in any prison or prisons whatever*." But in the 5 Geo. c. 24. s. 5. (now expired) from which this clause is, in other respects, almost an exact transcript, the words are "in the custody or possession of such bankrupt, or of any other person, *or in any prison or prisons whatever*." Is the omission in the 5 Geo. 2. of the word *or*, which so materially alters the sense, only a slip made in copying the one from the other?

fere



fere in aid of the commissioners' warrant. Of the only two cases I find upon the subject, neither afforded, under the particular circumstances, an opportunity favourable for any extraordinary interposition. In the one<sup>c</sup>, some goods of a bankrupt, on board ship, consigned to persons abroad who had not paid for them, were refused to be delivered up on the commissioners' warrant. On motion for an order upon the masters, as for a contempt, Ld. Cowper thought the refusal no contempt of the court of Chancery, though commissioners act under a commission under the great seal, and he doubted whether he could make an order in aid of their warrant, the statutes having vested a large power in them. And considering the masters as having some colour to detain the goods, as otherwise they might be disappointed of their freight, he would only make an order for their delivery, on being paid the freight, and being indemnified against the consignees. In the other case<sup>d</sup>, the seizure was clearly illegal, and the petition complaining of a force upon the messenger was dismissed with costs; Ld. Hardwicke only observing, that though the seizure was illegal, the forcibly turning the messenger out of possession could not be justified; but that the owner of the goods ought to have asserted his right by a due course of law.

<sup>c</sup> Molloy 253. 2 Eq. Abr. 98.<sup>d</sup> Exp. Tibner, 1 Atk. 136.

*Of the effect of the party's death.*

A commission of bankrupt being a proceeding against the person as well as the effects, it was always very clear that it could not be taken out after a man's death<sup>e</sup>; but before the statute of the 1 Jac. it seems to have been doubted, whether by the death of the party afterwards, the commission did not abate. But by that statute it is provided that, if, after a commission sued forth and *dealt in*, the offender happen to die before distribution, &c. the commissioners may proceed. No statute, however, defines what shall be considered as a *dealing* in the commission. In one case, the party died on the very day that he was declared a bankrupt, and that his effects were assigned; but between the time of the declaration, and that of making the assignment; the commissioners having no notice of his death till after the assignment was made. Before his death, he had devised his estate for the payment of debts; and upon a bill filed by a creditor against the assignee for an account, and the commission, &c. being pleaded, Ld. Talbot allowed the plea; saying he knew no particular act distinct from another, that could be called a dealing; that it was not probable the act should intend the com-

<sup>e</sup> 1 Vern. 153, 4. Forr. 186.

## DECLARATION OF BANKRUPTCY.

81

missioners' *declaration* to be a dealing, which it had nowhere authorized them to make; and that whatever was done in *pursuance* of the commission, was a dealing in it, *if never so minute*†.

BOOK.III.  
CHAP.II.  
Sect. III.

† Warrington and Norton, Forr. 174.

CHAP.



## CHAP. III.

*Of the proof of debts under the commission.*

## SECT. I.

*Of debts generally.*

BOOK III.  
CHAP. III.  
Sect. I.

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**A**LTHOUGH the several debts which may or may not be proved under a commission, and the nature and extent of the relief to which the several classes of creditors are respectively entitled, necessarily require a separate and distinct consideration, according to the peculiar circumstances and situation of each; yet there are certain rules that may be laid down upon this subject, which will admit of a general application. These relate, first to the *time* at which a debt accrues; secondly, the *certainty* of its *amount*; and lastly, its *consideration*: and are mostly derived, not from the express letter of the statutes themselves, which give no explicit directions upon the subject, but by necessary or obvious inference from certain regulations contained in them with respect to other matters.

1. *Of the time at which a debt accrues.*

No debt can be proved under a commission of bankrupt, but such as existed before, and at the time of the bankruptcy.

By

By the 5 Geo. 2. it is provided that a bankrupt's certificate shall discharge him from all debts, due or owing by him *at the time* he became bankrupt, and that in case he is sued for any such debt, he may plead generally that the cause of action accrued *before that time*. By another clause in the same statute, the mutual credit or mutual debts directed to be set against each other are such only as subsisted *before* the person became bankrupt. And by the 7 Geo. 1. bankrupts are discharged from debts, upon securities payable at a future day, in like manner as if they had been made payable *presently*, and not at a future day.

All these provisions very plainly shew, that the line intended to be drawn by the legislature, with respect to the creditors entitled to relief under a commission, was meant to be confined to those who were so *at the time* of the bankruptcy. And if this rule had not been adopted, but creditors, whose debts arose subsequent to the bankruptcy, were allowed to come in along with those whose debts accrued before; the certificate would operate unequally, and be attended with a manifest hardship to the latter, who would have nothing more than a dividend under the commission, while the former would not only have an equal dividend, but would have a remedy besides open to them against the bankrupt afterwards, for the residue of their debts. The privilege, therefore, of creditors to come in and prove their debts, and of bankrupts

BOOK III.  
CHAP. III.  
Sect. 1.

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to be discharged therefrom, has been, with great justice, held to be co-extensive and commensurate<sup>g</sup>.

In the application, however, of this rule, a question necessarily arises; namely, at what time a debt shall be said to accrue. With a view to this question, all the several debts or demands of creditors may be divided into two general classes, of *Absolute* or *Certain* debts, or such as are payable *certainly* and *at all events*; and *Contingent* debts, or such as arise or become due and payable only upon the happening or taking effect of some uncertain event or *contingency*.

Of these two general descriptions of debts, those only can be proved under a commission, which were either originally debts certainly payable, and which existed at the time of the bankruptcy; or which, though originally contingent, yet from the contingency having happened before the bankruptcy, were then become absolute debts, or debts certainly payable. Contingent debts, in which the contingency has not taken effect *before* the time of the bankruptcy, are not allowed to be proved, because at *that* time, it must have been altogether uncertain, whether the contingency would ever happen, and therefore whether any debt would ever arise or become payable at all<sup>h</sup>.

But debts of this kind are to be distinguished from such where the contingency relates only to

<sup>g</sup> 1 Atk. 119. 3 Will. 269.

<sup>h</sup> 2 P. W. 396. Str. 862. 1043.

Ld. Raym. 1149. 1 Atk. 119.

116, 17. 3 Will. 269—271.

their



their defeazance; for the latter, if originally vested and certain in their first constitution, may still be proved, though liable to be defeated by some future contingency; provided the contingency has not happened before the time of proving<sup>1</sup>.

Again, with respect even to the first class of debts mentioned, that of debts certainly payable, a further distinction has been made, between such as were both due and payable before the bankruptcy, and such as though certainly *due*, yet were not actually *payable* before that time. Until the 7 Geo. 1. the former alone were permitted to be proved, and not the latter; inasmuch as with respect to these, though certainly *due*, the payment only being postponed to a certain future time, yet not being actually *payable* before the time of the bankruptcy, it could not be said that the *cause of action* accrued before that time<sup>2</sup>. To remedy an inconvenience so injurious to mercantile *credit*, that statute declared that creditors taking *bills, bonds, notes, or other personal securities* (30) for their monies payable at a future day, should be admitted to prove and receive dividends, although the commission were taken out before the money upon

<sup>1</sup> Walcott and Hall, 2 B. o. 305.  
and see Staines and Planck, 3  
T. R. 389.

<sup>2</sup> Callowell and Clutte buck,  
Str. 867. Godling and Godling,  
Ld. Raym. 1548. 2 P. W. 396.  
Ld. Raym. 1549.

(30) The words of the statute are "other *person's* securities," which is plainly a blunder, and is corrected by the 5 Geo. 2. c. 30. s. 22. (Cowp. 543.)

BOOK III.  
CHAP. III.  
Sect. I.

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such securities became payable, deducting only a rebate of interest to be computed from the actual payment to the time the debt would have become payable by the securities.

This statute, however, is held to extend only to such debts, as, though payable at a future day, are payable at a future day which will certainly come to pass. But contingent debts are held not to be within the statute; for it being uncertain whether they will ever become due or not, it is impossible to make such rebate of interest upon them, as the act directs, there being no certain time to compute it from; and therefore such debts remain upon their former footing, except in certain cases, provided for by particular statutes<sup>1</sup>.

This statute, it was formerly held, was confined to cases of securities in writing, and that it did not extend to the case of debt for goods sold upon *credit* merely<sup>m</sup>: but as a more liberal construction appears lately to have been adopted with respect to the sufficiency of such a debt to *support* a commission, there seems no reason why it should not equally be allowed to be *proved* under it.

It is also generally considered as applying only to securities for the payment of *money* (31).

2. Of

<sup>1</sup> 2 P. W. 396. 1 Atk. 114.  
Str. 868. 1043. 3 Will. 270, 1.

<sup>m</sup> Exp. E. J. Co. 2 P. W. 396.

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(31) The *preamble* speaks only of "securities for monies"—and of commissions taken out before "the monies become payable."

## PROOF OF DEBTS GENERALLY.

87

BOOK III.  
CHAP. III.  
Sect. I.

### 2. *Of the certainty of its amount.*

The amount of the debt must be precisely ascertained.

This rule, which the obvious propriety of it might at any rate suggest, has partly also been derived from the power given by the statutes to examine

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able,"—and "securities for monies,"—are the words used in reciting this act in the 5 Geo. 2. The rebate of interest also, is directed to be computed from the actual payment to the time such debt, duty, or "sum of money should or would have become due and payable."—

Yet Mr. J. Buller, in the case of Utterton and Vernon when it came first before the court (3 T. R.), was of opinion that that case, which was that of a promise in writing, to replace *stock*, but without mention of any time, fell within the principle and good sense of the statute, though not within the *very* words of it; and that the object of it was that all demands existing prior to the bankruptcy, though not payable till a future day, might be proved under a commission, *provided they were capable of being ascertained.*

And it may further be observed, 1. that the *enacting* part of the statute uses only the general terms "such securities,"—and "securities payable."—The word "such," it has been long settled, relates neither to the subject, nor the consideration of the security, but only to the form of it, namely bonds, bills, notes, &c. Nothing, therefore, can be more general than these terms. 2. In the clause which says, that "every person who shall give credit on such securities, upon a good and valuable consideration, *bonâ fide*, for any sum of money, or other matter, or thing whatsoever, which is, or shall not be due and payable at or before," &c.; these words, "for any sum of money, or other



BOOK III.  
CHAP. III.  
Sect. I.

amine upon oath as to the truth and certainty of the several debts claimed by creditors seeking relief under a commission. Under that authority, the usual proof required, is the oath of the creditor, upon which, if he swears falsely, he is liable to an indictment for perjury. As he must be able, therefore, to swear positively and precisely to a particular sum due, it follows of necessity that the debt due at the time of the bankruptcy must either be actually liquidated and ascertained, or at least capable of being so at that time. And it is accordingly considered as a general and invariable rule, that no demand which was not so, or in its nature not capable of being so, can be proved under a commission of bankrupt<sup>n</sup>.

<sup>n</sup> 3 Will. 271. 3 T.R. 546. 548. and see below, Sect. II. tit. *Damages*, p. 110.

other matter or thing whatsoever," can only be considered in one of two ways: either as descriptive of the *consideration*, or of the *subject* of the "securities."—That they must relate to the latter, and cannot relate to the former, seems manifest from the words immediately following them, namely "which *is*, or shall not be *due* and *payable*." Surely it is not the consideration of a security, that is made *due* and *payable*, but the subject of it, or the thing secured; and this by the express words, may be money, or other matter or thing whatsoever. 3. If the words, "debt, duty, or sum of money," in the clause concerning the rebate of interest, are not mere tautology, (and their difference is sometimes very material in questions of bankruptcy. See 1 Atk. 196.), a promise to replace *stock*, if it is not a debt or sum of money, is at least a *duty*, and capable of liquidation in money, so as to become the subject of a rebate of interest.

3. Of

3. *Of its consideration.*BOOK III.  
CHAP. III.  
SECT. I.

The debt must also have a lawful consideration.

A demand founded upon an illegal contract, cannot be proved under a commission: as, debt upon a usurious contract°. Though the rule in equity, is, not to make void the whole debt, but only the excess of interest, on a submission to pay what is really due; it is different under a commission of bankrupt. The assignees have a right to insist that the whole is void; and unless they and the creditors submit to pay what is really due, the court cannot order it, and frequent applications of that kind have been refused<sup>p</sup>.

So, a demand for the price of goods, sold to be sent to India, contrary to the statute, cannot be proved<sup>q</sup>; unless it appears that the party selling the goods did not know their destination<sup>r</sup>.

Where the consideration of a security consists of two parts, one bad and the other good, the equity is, that the security shall avail as to what was good. A broker being employed to effect some insurances, one of which was illegal, (being upon a voyage from Ostend to the East Indies), the principal, in consideration of the money laid out in effecting them, indorsed to him a bill drawn by the principal, payable to his own order, upon and accepted by a third person who afterwards became bankrupt. The

° 3 Will. 262.

<sup>p</sup> Exp. Thompson, 1 Atk. 125.

Exp. Skip, 2 Vez. 489.

<sup>q</sup> Exp. Moggridge, Co. B. L.

185.

<sup>r</sup> Ibid.

broker,

BOOK III.  
CHAP. III.  
Sect. I.

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broker, the indorsee, was not allowed to prove against the acceptor, in respect of such part of the debt as arose upon the illegal insurance, but it was held he might prove for the rest<sup>s</sup>.

Provided the consideration is lawful, it is not necessary it should be in respect only of some matter in *trade*. Even under the 7 Geo. 1. c. 31. relative to securities, payable at a future day; though the preamble speaks only of *goods* sold upon trust by *merchants* and *traders*, yet the enacting part is held to extend to *all* persons giving credit upon securities payable at a future day; without any other distinction as to the consideration, but that it must be valuable and *bonâ fide*<sup>t</sup>. And debts contracted even after the party has left off trade altogether, may be proved under a commission, although a commission cannot be sued out upon a debt under such circumstances<sup>u</sup>.

If a bond is given for the payment of money, in consideration that the obligee would marry and settle an estate upon a servant maid, and maintain a bastard which the obligor had by her, it is a good consideration as between the parties, it is a stipulation in consideration of marriage, and the bond may be proved, within the 7 Geo. 1., under a commission against the obligor<sup>x</sup>.

<sup>s</sup> Exp. Mather, 3 Vez. J. 373.

<sup>t</sup> Swain and De Mattos, Str.  
1211. 3 Will. 271. Pattison and  
Banks. Cowp. 540.

<sup>u</sup> Meggot and Mills, Ld.  
Raym. 286.

<sup>x</sup> Exp. Cottrell, Cowp. 742.

Though



## PROOF OF PARTICULAR DEBTS.

91

Though annuitants are admitted to prove for the value of their annuities, and the assignees consent to the proof, the court will give the general creditors an opportunity of objecting, on the ground of the consideration being inadequate<sup>r</sup>.

BOOK III.  
CHAP. III.  
SECT. II.

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### SECT. II.

#### *Of particular debts.*

Besides the circumstances mentioned in the former section, and which affect all creditors whatever, there are others peculiar to certain classes of them, depending partly on the particular nature and ground of their respective debts, partly upon the form of the instrument by which they are created or secured: and these have given rise to some variety in the mode and extent of the relief to which such creditors respectively are entitled (32).

#### *Account.*

Where a party is entitled to retain money on a fluctuating account, till a certain time, and the cre-

<sup>r</sup> Exp. Cator, 1 Bro. 267.

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(32) Founding partly upon the circumstances considered in the preceding section, and partly upon other grounds of distinction, I had conceived an arrangement, in somewhat of a systematic form, for the whole of this subject; but fearing it might not be sufficiently familiar, in a case where the professional reader's ease in finding any particular topic of enquiry, must be attended to, I have had recourse to the old and ready system of the alphabet.

ditor

BOOK III.  
CHAP. II.  
Sect. II.

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ditor has no right to call upon him for a balance sooner; if in the mean time a bankruptcy happen, the debt, as for the balance as existing then, supposing the account to have been then taken, cannot be proved, there being no cause of action till after the bankruptcy. As in the case of an *overseer of the poor* receiving money in that character, and becoming bankrupt before the time when his accounts were to be made out<sup>z</sup>.

See further, Sect. III.

#### *Annuities.*

In the case of annuities *on lives*, the growing payments depending on the life during which they are made payable, are plainly of the nature of a contingent debt; and nothing, strictly speaking, but the arrears actually accrued before the bankruptcy, can be considered as an absolute debt regularly proveable under a commission. Courts of equity, however, followed by the courts of law, in order to relieve this class of creditors, as well as the bankrupt himself; where the annuity is not a rent-charge upon land or any specific part of his effects, but constitutes only a general personal demand against him, secured by a bond with a penalty, have had recourse to the legal subtlety of considering that penalty as the debt at law, when a forfeiture has once been incurred. And to re-

<sup>z</sup> King and Egginton, 1 T. R. 369.

deem

deem that forfeiture, and at the same time avoid the inconvenience of a perpetual division of the estate, if the annuity were to be paid from time to time as the growing payments became due, they allow a *value* to be set on it, (in which, consideration is to be had of the time it has been already enjoyed)<sup>a</sup>, and direct that the annuitant shall come in as a creditor under the commission for *that value*<sup>b</sup>. But unless the bond has been forfeited, the creditor will not be relieved under the commission, for the growing payments<sup>c</sup>.

And acceptance of the arrears after a forfeiture, is held not to be a waiver of it: bonds for annuities on lives, being held, by another subtlety for the sake of this favoured class of creditors, not to be within the statute of the 4 and 5 Anne, they not being bonds with a defeazance for the payment of a lesser sum at a *day or place certain*<sup>d</sup>.

In one case<sup>e</sup> where there was neither bond nor penalty, an annuitant was allowed to prove; as where a testator, to whom the bankrupt was indebted, forgave, by his will, a part of the debt, on condition of paying an annuity: and in case of default, the *executrix* was to *call in* the whole. The payments had been in arrear, but afterwards paid

<sup>a</sup> 1 Atk. 251.

<sup>b</sup> Exp. Le Compte, *ibid.* Exp. Belton, *ib.* Exp. Artis, 2 Vez. 493. Perkins and Rempland, Bl. 1106. Wyllie and Wilkes, Dougl. 519.

<sup>c</sup> Exp. Burrow, 1 Bro. 268.

<sup>d</sup> 1 Atk. 118. Bl. 1106. Dougl. 519.

<sup>e</sup> Exp. English, 2 Bro. 610.



BOOK III.  
CHAP. III.  
Sect. II.

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up, and the annuitant's receipts taken for them: the only question made was, whether the receipts of the third person were to have the same effect as the receipt of an obligee to an obligor; and the executrix was admitted a creditor for the principal sum.

If an annuity is secured only by covenant, the creditor can have no relief under a commission for arrears accruing after the bankruptcy, but may sue at law upon his covenant<sup>e</sup>. But if it is secured both by covenant and a bond with a penalty, he may *elect* which remedy he pleases<sup>f</sup>.

A bond for payment of an annuity for a number of years *certain*, in which the payments are *fixed* at *certain* periods, is not at all a contingent debt; and though no forfeiture has been incurred, may be proved like other debts payable at a future day certain, under the 7 Geo. 1.<sup>g</sup>

### *Apprentices.*

Where a master receives a sum of money with an apprentice, and becomes bankrupt, the apprentice is strictly entitled only to come in as a creditor; and to prove for the money paid, or for the residue, after deducting his board for the time he has lived with the bankrupt. But being a case of com-

<sup>e</sup> Fletcher and Bathurst, 7 Vin. 71.

<sup>f</sup> Cotterell and Hooke, Dougl.

<sup>g</sup> Pattison and Banks, Cowp. 540.

passion, it has been usually *recommended* to allow a gross sum out of the estate to put him out to another master<sup>h</sup> (33).

BOOK III.  
CHAP. III.  
Sect. II.

### *Award.*

An award creates a debt at law, which, if the award is before the bankruptcy, is discharged by the certificate<sup>i</sup>, and therefore proveable under a commission.

So where an attorney recovered a debt for a client, who alleged he had not paid over the fair balance; application was made for the usual rule of reference to the master, which, upon shewing cause, was made absolute; and before any further proceedings, the attorney became bankrupt, and obtained his certificate. The debt was held to be discharged<sup>k</sup>.

<sup>h</sup> Exp. Sandby, 1 Atk. 149.  
Barwell and Ward, ib. 261.

<sup>k</sup> Bird and Jones, Co. B. L.  
509.

<sup>i</sup> Str. 1152.

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(33) Is he strictly *entitled* to come in as a creditor? He cannot make his demand as for a breach of covenant, because there the damages are *uncertain*, depending on a variety of circumstances of the conduct of both parties. If he claims as for money had and received, and the master's disability to maintain or employ him, arises, as is commonly the case, only from the bankruptcy, the demand is premature; the consideration, on which the money was paid, not having failed before the bankruptcy.

*Bail.*

*Bail.* See *bonds, costs of suit, and sureties.*

*Bills of exchange and promissory notes.*

1. As the holder of a bill or note is entitled at law to several actions, judgements, and executions against all the parties till his debt is completely satisfied, but cannot levy more than one satisfaction, and if he does, courts of equity, and even of law, will order restitution<sup>1</sup>: so under commissions of bankrupt, he is entitled to prove against all the several parties under their respective commissions, and to receive dividends upon the whole sum under each, but so that he shall not in the whole receive more than 20 s. in the pound, and if he does, he shall account for the surplus. But if he has received part, before he comes to prove, he is not allowed to prove or receive dividends upon more than the residue, because he cannot swear that any more is then due to him. This was formerly held otherwise<sup>m</sup>, but it is now completely settled<sup>n</sup>.

2. The *bonâ fide* holder of a bill, drawn for a valuable consideration originally, by one who afterwards becomes bankrupt, may prove for the whole sum contained in it, and receive dividends to the

<sup>1</sup> 1 Atk. 110.

<sup>m</sup> Exp. LeFebvre, 2 P. W.  
407. Exp. Ryfwicke, ib. 89.

<sup>n</sup> Exp. Wildman, 2 Vez. 113.  
S. C. 1 Atk. 109. Cowper and  
Pepys, 1 Atk. 107.

extent



extent of the whole, though he may have given a less consideration for it<sup>o</sup> (34).

BOOK III.  
CHAP. III.  
Sect. II.

So on a bill drawn by way of accommodation, as it is called, which cannot be proved as between the parties to the accommodation, the holder for a valuable consideration may *prove* (against all the parties but him from whom he received it) the whole sum contained in the bill; but he is not allowed to receive *dividends* beyond 20 s. in the pound on the consideration he actually paid<sup>p</sup> (35).

Where two agree that the one shall accept and pay all drafts that a third shall draw upon him on account of the other, and the party who draws has effects in the hands of the latter, though not in the hands of the acceptor, the acceptor by such an agreement, makes himself equally liable, and puts himself just in the same situation with the other, and the drawer may prove the bills under a commission against the acceptor<sup>q</sup>.

<sup>o</sup> Exp. Marlar, 1 Atk. 150.  
Exp. Lee, 1 P. W. 782.

<sup>p</sup> Exp. King, Co. B. L. 157.  
Exp. Crofsley, 3 Bro. 237.  
<sup>q</sup> Exp. Marshall, 1 Atk. 131.

(34) But it should seem that as to all beyond 20 s. in the pound *on the consideration he gave*, he might, in some cases, be only a trustee for him of whom he received the bill, and that as to such surplus, the assignees might have the benefit of any set-off or counter-demand in an account with the latter.

(35) In a case of accommodation, where the estate does not receive the benefit, would it not be more equitable to make the *proof* commensurate to the real debt?

H

3. Bills

3. Bills made payable to fictitious payees, may be proved by the indorsee for a valuable consideration, against the indorser<sup>1</sup>.

4. A bill drawn by one before his bankruptcy, though not protested till after, may be proved under his commission: for the drawer of a bill contracts a debt the instant he draws it, and it is not the non-acceptance or protest that raises the debt; that is only notice that he must go back to the drawer who must pay. It is *debitum in præsentis solvendum in futuro*, and within the 7 Geo. 1.<sup>2</sup>

5. A bill or note taken up by an indorser, after the bankruptcy of the acceptor or maker, may be proved under a commission against the latter<sup>3</sup> (36).

#### 6. Giving

<sup>1</sup> Exp. Clarke, 2 Bro. 238. Exp. Allen, Co. B. L. 172. and see many late cases at law in T. R., B. R., and C. P. that such bills may be recovered by bona fide holders.

<sup>2</sup> Macarty and Barrow, Str. 949. better reported in 3 Will. 16.

<sup>3</sup> Exp. Brymer, Co. B. L. 164. Exp. Seddon, 7 T. R. 570. 575.

(36) This is supposed to have been contradicted by the cases of Brooks and Rogers, and Howis and Wiggins (see title *Sureties*), but perhaps they are not irreconcilable. The indorsers in these cases were merely *sureties*, as between whom and the drawers no real debt existed till the bill and note respectively were taken up and paid. They were argued as cases of *sureties*. The court compared them with cases of that kind; decided them as such, and considered that there was no debt existing in any shape before the indorsers actually paid the money; and in the case of Howis and Wiggins, observed, that when the indorser took up the note after the bankruptcy, it was not *referable* to any time *antecedent*. But in exp. Brymer, the indorser, for any thing

6. Giving time to the acceptor, or neglecting to give notice of non-acceptance or non-payment, BOOK III.  
CHAP. III.  
Sect. II.  
or

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thing that appears, was a fair creditor of the acceptor (or what was the same thing, of the persons for whose use the acceptor had agreed to accept), at the time the bills were given him; and his subsequent act of paying the amount to the indorsee *was* referable to an original debt antecedent to the bankruptcy, when he was a fair creditor upon the very securities in question. This was still more clearly the case in *exp. Seddon*. (See *Cowley and Dunlop*, 7 T. R. 565.) Indeed any doubt, as to whether a bill or note negotiated after the bankruptcy, may be proved though the holder *never* was in possession of it, at any time before the bankruptcy, it seems to me, may, perhaps, have proceeded from confounding the *debt* with the *creditor*. That a commission may be *sued out* on such a debt, and that the assignment relates to the original debt, has been long settled (see above, p. 74.); and no reason occurs to me why such a debt should be held sufficient to *support* a commission, and yet that it should not be allowed to be *proved* under it. I am aware that it has been observed, that the statute says nothing about the time of the *petitioning creditor's* debt, and that it is enough, therefore, if a *debt* as against the *bankrupt* before the bankruptcy, exists in the person of the petitioning creditor at the time he *petitions*. (*Glaister and Hewer*, 7 T. R. 498.) But neither do the statutes say any thing about the time of the debts to be *proved*. Their intention, in that respect, has only been collected by inference from the effect of certain regulations contained in them with respect to other matters (see above, p. 82.); and although by construction, they are very justly supposed to have intended that only such *debts* as *existed* before the bankruptcy, should be proved under the commission; yet they nowhere say, nor are construed to say, that the *person* who comes to prove, must have had the debt vested in *him* before the bankruptcy,



BOOK III.  
CHAP. III.  
SECT. II.

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or of a partial payment, discharges the drawer and indorsers, unless the acceptor had no effects in his hands, in which case the drawer cannot be injured, and the bill may be proved under his commission<sup>u</sup>; or if the holder takes security of the acceptor, for this is in favour of the drawer<sup>x</sup>.

Though the party is a bankrupt, yet the holder must give notice to him or his assignees, of the non-acceptance or non-payment<sup>y</sup>.

7. If a note is indorsed after it is due, the indorsee takes it subject to the same equities as the indorser<sup>z</sup>.

8. A bill taken without the name of the party delivering it, may, according to the agreement of the parties, be either as a sale of the bill, or as a

<sup>u</sup> Exp. Holden, Co. B. L. 167.

<sup>z</sup> Brown and Davies, 3 T. R.

<sup>x</sup> S. C. *ibid*.

80. Boehm and Stirling, T. R.

<sup>y</sup> Dougl. 115.

and they expressly enact that the certificate shall discharge the bankrupt from *all debts* due or owing by him before that time. In the case of Marsh and Chambers, Str. 1234. a note indorsed after the bankruptcy of the drawer, to a debtor of the bankrupt, was not allowed to be set off. But a *set-off* applies to the whole sum, and a new charge might thereby be brought upon the estate, which it was not liable to at the time of the bankruptcy. In that case, however, the court only said the indorsee had no right to stand in a *better* situation than he who indorsed it to him, who could only come in for a *dividend*; but it was not even suggested that the indorsee had not a right to stand in the *same* situation; and the contrary is plainly implied, namely, that he might *prove* it, and take credit for the *dividends*.

pledge.

pledge. In the former case it cannot be proved against the party of whom it was taken<sup>a</sup>, and if taken as a collateral security for a subsisting debt, it is a liquidation of the debt, to the full amount of the bill<sup>b</sup>. And though there is a private mark upon the bill, and the party admits that upon all bills transferred without indorsement, on which he made that mark, he considered himself liable as if he had indorsed, this falls within the same rule<sup>c</sup>.

If it is taken as a pledge, it must be sold, and the creditor can only be admitted to prove for the residue<sup>d</sup>.

9. The costs and charges of protesting bills, incurred *before* the bankruptcy, may be proved; but not those incurred *after*<sup>e</sup> (37).

The

<sup>a</sup> Exp. Shuttleworth, 3 Vez. J. 358.

<sup>d</sup> Exp. Smith, Co. B. L. 119, 120.

<sup>b</sup> Exp. Whitter — Roberts — Smith, Co. B. L. 120.

<sup>c</sup> Anon. 1 Atk. 140. Exp. Moore, 2 Bro. 597.

<sup>e</sup> Exp. Shuttleworth, *supra*.

(37) These costs have been likened (as it seems to me, improperly) to the case of costs of suit. The costs and charges of protesting bills *after* the bankruptcy, have no *subject* existing before, to which they can be considered as *necessarily* incident. At the time of the bankruptcy, it cannot be known that they will ever be incurred at all, but are at that time wholly contingent, in the strictest sense of the word, both as to their existence and their amount. But in the cases of *costs of suit*, (see below) either a debt originally liquidated, and on which a *suit* had been instituted *previous* to the commission, or a debt ascertained by verdict, or by some act of the court, *existed before* the bankruptcy;

BOOK III.  
CHAP. III.  
Sect. II.

The difference upon the *re-exchange*, upon bills protested and re-drawn *after* the bankruptcy, seems to be upon the same footing with the ordinary expences of protest <sup>f</sup> (38).

See further, *Damages, Interest, Sureties*, and Sect. III.

<sup>f</sup> Francis and Rucker, Ambl. 672.

bankruptcy; and the *subsequent* proceedings were fairly considered as referable to that, and springing out of it, as *necessary* means to render *effectual* a right *before* vested in the party. The anonymous case in Atkins, in which these different kinds of costs were resembled to each other, is manifestly, in part, misreported; and what part is rightly reported, namely, that though there is a verdict before bankruptcy, the costs on a judgement signed after, cannot be proved, has been over-ruled frequently since.

In the case of Francis and Rucker, (Ambl. 672.) Ld. Camden allowed costs and charges of protest *after* the bankruptcy, to be proved, but he went upon a special agreement of the parties, founded upon an act of the colony in which the transaction arose, the effect of which was, that the expences in question were a *liquidated* damage, precisely ascertained by, and forming a part of the original contract. See 2 Bro. 599.

(38) Though the re-exchange may be said to be a demand founded upon, and making part of the original contract, yet it is to be considered that the subject of the contract in that respect, is a thing of an uncertain nature, at the time. By the daily variations in the course of exchange, it must, at the time of the bankruptcy, be altogether uncertain, both whether there will be *any* additional charge upon that account at all, and also what will be its *amount*. It is at that time, both as to its *existence* and its *amount*, purely *contingent*.



*Bonds.*BOOK III.  
CHAP. III.  
SECT. II.

The same rules apply here as in the case of bills of exchange, with respect to the creditor's right of proving against all the parties, and as to the amount of his proof according as he comes to prove before or after having received any part of his debt<sup>g</sup>.

Debt on a *bail bond* given by a *defendant* to the sheriff, forfeited by non-appearance, *before* the defendant becomes bankrupt, is barred by the certificate<sup>h</sup>; and therefore, I presume, proveable under the commission.

But debt on such a bail bond *not* forfeited till *after* the bankruptcy, is a new and distinct cause of action, which not accruing till after the bankruptcy, is not barred<sup>i</sup>; and therefore cannot be proved.

A bond given to replace *stock* by a given day, may be proved, if forfeited before the bankruptcy<sup>k</sup>.

See titles, *Annuities, Creditors in equity, Insurance, Interest, Marriage articles, Sureties.*

*Children.*

On the petition of a child to be admitted as a creditor, under a commission against the father, for money had and received by him, which she had earned while living with him, and making part of

<sup>g</sup> Exp. Wildman, 2 Vez. 113.<sup>i</sup> Cockerill and Owston, Burr.<sup>h</sup> Bouteflower and Coats, 436.  
Comp. 25.<sup>k</sup> Exp. Leitch, Co. B. L. 149.

BOOK III.  
CHAP. III.  
Sect. II.

---

his family, *Ld. Hardwicke* expressed great difficulty on account of the precedent; but referred it to the commissioners to enquire how much the father had received to the child's use; and it was afterwards compromised by the parties' agreeing to admit the child as a creditor for a certain sum, but without any allowance for the maintenance<sup>1</sup>.

*Creditor by composition.*

Where a creditor agrees to a *composition* to be paid by instalments, and the debtor becomes a bankrupt, *Ld. Hardwicke* was inclined to think he ought not to be obliged to come in only for the composition, but that he might prove for the original debt<sup>m</sup>. For in the case even of common creditors and debtors, where a creditor agrees to take less than his debt, so that it be paid precisely at the day, if the debtor fails of payment, he cannot be relieved in equity.

*Costs of Suit.*

1. At law.

It was formerly held, that where judgement was signed after the bankruptcy, the *costs*, which were said to have their origin in the judgement, were a debt accruing after the bankruptcy, and therefore not proveable under the commission<sup>n</sup>. But it has been since determined, that where there is a *verdict*

<sup>1</sup> *Exp. Macklin*, 2 *Vez.* 675.

<sup>m</sup> *Exp. Bennett*, 2 *Atk* 528.

<sup>n</sup> *Exp. Todd*, 3 *Will.* 270.

before

before the bankruptcy, the *costs* may be proved, although the *judgement* and taxation is subsequent; for the judgement is held to relate to the verdict, and the costs *de incremento*, when taxed, are considered as annexed to those found by the jury, and consolidated with them by an equitable relation of law<sup>o</sup>. And it makes no difference though the original cause of action was for a *tort*, for the cause of action existing before the verdict, the damages are by the verdict *ascertained* and become a *debt*<sup>r</sup>.

BOOK III.  
CHAP. III.  
Sect. II.

So in the case of the costs of a *nonfuit* at *Nisi prius* before the bankruptcy, on which the *judgement* of nonfuit and taxation of costs is not till after it. For in such a case it is held, that the *debt* exists before, and the taxation merely ascertains the *amount*<sup>s</sup>: and this determination has been since followed, but with some doubt of the principle<sup>r</sup>.

In like manner, the costs of a *scire facias* or writ of error brought after the bankruptcy to revive or reverse respectively a judgement recovered before it, are held to relate back to the original judgement<sup>s</sup>.

And it seems even where both the verdict and the judgement are after the bankruptcy, that the costs may be proved, if the *debt* for which the

<sup>o</sup> Aylett and Hartford, Bl.

1317. Exp. Simpson, 3 Bro. 46.

<sup>p</sup> Longford and Ellis, H. Bl.

29.

<sup>q</sup> Hurst and Mead, 5 T.R. 365.

<sup>r</sup> Watts and Hart, Pull. and Bos. 134.

<sup>s</sup> Phillips and Brown, 6 T.R. 282.

action



BOOK III.  
CHAP. III.  
Sect. II.

---

action was *brought before* the bankruptcy, was such a liquidated debt as might have been proved independent of the action<sup>1</sup>.

There are several cases<sup>2</sup>, in which, costs of suit incurred after the bankruptcy are held to be discharged by the certificate, as having relation to the original debt; but which I conceive could not be proved under the commission: as where the *suit* on which the costs are incurred, is not *commenced* till after the bankruptcy. The principle of the cases in which costs incurred after the bankruptcy have been allowed to be proved, seems to be, not only that there was an actual debt either originally or by verdict, or some act of the court, existing before the bankruptcy, but that at least an inchoate right to the *costs*, was vested in the party, by a *suit* actually *commenced* before that time, and that the *subsequent* proceedings were considered as springing out of it, and as steps *necessary* only to *complete* a right before vested, and to ascertain its amount.

Where the original cause of action is for a demand, in its nature *uncertain* and *contingent*, as for damages *in tort*, the *costs* cannot be proved, *unless* there is a *verdict* before the bankruptcy; for in

<sup>1</sup> Lewis and Piercy, 1 H. Bl. 29. and see Ld. Ch. J. Eyre's observations on this case in Watts and Hart, Pull. and Bos. 134.

<sup>2</sup> Blackhall and Combs, 2 P. W. 70. Graham and Benton, Str. 1196. 1 Wils. 141. Blandford and Foote, Cowp. 138.



such a case, the subject to which they are incident, was not a *liquidable* debt due at the time of the bankruptcy, or which could have been proved under the commission <sup>x</sup>.

2. In equity.

In courts of equity, it is entirely in the discretion of the court whether there shall be any costs at all <sup>y</sup>. There, it is said, the *taxation* constitutes the *demand*; and if the *taxation* is subsequent to the bankruptcy, though the *order* for it was made before, the debt is also subsequent, and cannot be proved under a commission <sup>z</sup>.

See *Executor*.

*Covenants and agreements.*

Whether any particular demand in covenant, may or may not be proved, must depend upon the kind of covenant, and the subject matter of it. In the case of covenant, or other agreement with or without deed, for the performance of certain *acts* at *future* times, as the demand does not arise till a breach has actually taken place, but remains, till that time, wholly contingent and uncertain; in such cases, if a bankruptcy happens before, the demand is plainly not capable of being proved under the commission. As in covenant by the

<sup>x</sup> Walter and Sherlock, 3 Will. 272. This case seems misstated in 3 Will. 270.

<sup>y</sup> 2 Bl. Com. 439.

<sup>z</sup> Exp. Sneaps, Co. B. L. 192.

assignee

BOOK III.  
CHAP. III.  
Sect. II.

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assignee of a lease to indemnify the assignor against the covenants of the original lease, and no breach till *after* the bankruptcy<sup>a</sup>. So on an agreement to discharge a debt by the debtor's recommending to the creditor, from time to time, within the space of four years, certain parcels of goods for his purchase, and undertaking that the profits on the sales, in the course of the four years, should be sufficient to discharge it, or otherwise that he would pay the difference immediately after the expiration of that time, in case he should be then living, and would make good any loss upon the purchases: this was held to be contingent till the expiration of the four years, and which therefore could not be proved as a debt under a commission taken out before that time<sup>b</sup>.

Demands in covenant for the performance of *acts*, are also frequently not proveable, for the uncertainty of the *damages*. And even covenants for the payment of *money* only, are sometimes contingent; as for *rent* or for *annuities on lives*, (see titles, *Damages*, *Rent*, *Annuities*, and *Marriage articles*).

But where a covenant is neither contingent in the event, nor uncertain in the damages, but for a specific sum of money *certainly* due and payable at all events, at a future day, it may be proved as any other debt. As where two persons having

<sup>a</sup> Mayor and Steward, Burr.  
2439.

<sup>b</sup> Hancock and Entwistle, 3  
T. R. 435.

taken



taken another into partnership for a number of years *certain*, in consideration of a sum of money actually advanced by him, covenanted to repay it by installments after the *expiration*, or other sooner determination of the partnership: this, after a breach in non-payment after the partnership determined, was held to be proveable with a rebate of interest in like manner as other debts certainly payable at a future day <sup>c</sup>.

Upon a promise in writing, to replace a certain quantity of stock, but without mention of any particular time; it has been held, not only that the demand is in its nature contingent, as long as the stipulation on which it is to arise, is not broken, as namely, where a *request* to replace it has not been made; but that the amount also is uncertain, no day being fixed, to which relation can be had for ascertaining the price of the stock <sup>d</sup>.

*Yet* *Ld. Hardwicke*, in a case of a deposit of navy bills, for which a note was given, promising to be accountable, without mention of any time, allowed the creditor to come in under the commission, and to prove, for the market price at the day of the deposit <sup>e</sup>.

And clearly, upon an agreement to transfer stock at a *particular* day, the party may prove for the value of the stock, at the price it bore on that day, *if* the day is *past* before the bankruptcy <sup>f</sup>.

<sup>c</sup> *Charlton and King*, 4 T. R. 156. and see 2 Mod. 197.

<sup>d</sup> *Utterton and Vernon*, 4 T. R. 570.

<sup>e</sup> *Bromley and Child*, 1 A. & K. 259.

<sup>f</sup> *Utterton and Vernon*, 4 T. R.

*Damages.*

*Damages.*

Demands in the nature of *damages*, are, generally speaking, not proveable under a commission of bankrupts. But though the usual form of action which a creditor would have for his demand at law, may be one in which he would recover it in the shape of damages to be given by a jury; or though perhaps in some instances, he could have no other kind of action; yet if his demand is of such a nature as admits of being liquidated and ascertained at the time of the bankruptcy, so that he can swear to the amount, he will be entitled to prove. It is only *contingent* and *uncertain* damages; such as take place in *some* cases of demands founded in *contract*; and in *all* cases of *torts*, where both the right to any damages at all, and also the amount of them, depend upon circumstances of which a jury alone can properly judge, and which, therefore, it requires the intervention of a jury to ascertain; that are not capable of being proved under a commission.

So a demand for goods sold, or for work and labour, without any agreement as to the price, which the party would recover at law as damages in *assumpsit* on a *quantum meruit*, may be proved, because the value may easily be ascertained, and the creditor can swear to the amount<sup>b</sup>.

<sup>a</sup> 1 Atk. 151.<sup>b</sup> Johnson and Spiller, Dougl. 167.

But

But in some cases of *covenant*, (not being for the payment of a determinate sum at a time certain, in which case, debt will lie as well as covenant), a variety of circumstances are frequently to be taken into consideration, which may increase, or mitigate, or even sometimes altogether excuse the damages, and which a jury only can in such cases ascertain and determine. And for this reason it has been held, that a man cannot prove a demand arising by breach of a covenant to build a certain number of houses, according to a particular plan, and within a given time<sup>i</sup>. Nor for breach of a covenant that the party of whom a frigate had been bought for a certain sum of money, had authority to sell clear of incumbrances<sup>k</sup>. And it has been held that even upon a covenant reserving a penalty or specific sum of money to secure performance, as on an obligation in a certain sum to perform covenants, the obligee, though there is a breach before the bankruptcy, cannot prove this as a debt<sup>l</sup>: nor a certain sum reserved by covenant in a lease, as a penalty on ploughing up meadow ground<sup>m</sup>: of which, the reason may, perhaps, be, that the penalty is considered only as limiting the *utmost* extent of damages recoverable in any possible case, but not as being the real measure of the

<sup>i</sup> Bannister and Scott, 6 T. R. 489.

<sup>k</sup> Hammond and Toulmin, 7 T. R. 612.

<sup>l</sup> 3 Will. 270.

<sup>m</sup> Ibid.

debt



BOOK III.  
CHAP. III.  
Sect. II.

debt in *every* case, however it might exceed the *damages actually sustained* (39).

In *tort*, the *damages* are plainly altogether contingent and uncertain, and a jury only can either determine whether the party shall have any at all, or settle the *quantum* to which under all the circumstances he may be entitled. Damages, therefore, where the party founds upon a *tort*: as for assault and battery<sup>n</sup>; or for slander<sup>o</sup>; or even in trespass for mesne profits, in which case the rent may not be the only measure of the damages<sup>p</sup>; or in trover<sup>q</sup>; cannot be proved under a commission, unless where they are ascertained by verdict before the bankruptcy<sup>r</sup>.

But where the demand is of a mixed nature, and the creditor may claim, either as founding upon

<sup>n</sup> Walter and Sherlock, 3  
Will. 272.

<sup>o</sup> Longford and Ellis, 1 H.  
Bl. 29.

<sup>p</sup> Goodtitle and North, Dougl.  
362. Gulliver and Drinkwater,  
2 T. R. 261.

<sup>q</sup> Parker and Norton. 6 T.  
R. 695. Johnson and Spiller,  
Dougl. 167.

<sup>r</sup> Longford and Ellis, 1 H.  
Bl. 29.

(39) Perhaps the cases of debts arising by forfeiture of a *penalty*, might be distinguished according as they happen to be, either securities, in *efficit*, for the principal and interest of a specific sum of money; or only for the performance of some collateral act, or enjoyment of some collateral object; in which latter case, the *damage actually sustained*, and not the *penalty*, ought to be considered as the *real* debt, and which it should seem, therefore, could not be proved, unless ascertained before the bankruptcy. See 1 Bro. 418. 2 ib. 341.

*contract,*

*contract*, or as for a *tort*, he may make his *election*, and will be entitled to prove, or not, accordingly. Thus, in the case of selling goods under an execution, which is afterwards set aside<sup>1</sup>; of not delivering goods according to agreement, which had been paid for<sup>2</sup>; of discounting a bill at a loss before it was due, and embezzling the money, by one to whom it had been delivered only for the purpose of receiving the money when due, and remitting it when received<sup>3</sup>; or of pledging a debenture for a debt of his own, by one with whom it had been deposited by another person only as a collateral security<sup>4</sup>; if the party goes for the *tortious* damages arising in such cases respectively, from the keeping him out of the goods and selling them under the void execution, from the fall of the market in the case of the goods not delivered according to agreement, from the breach of trust and the loss on discounting the bill, or from the keeping him out of the debenture; he cannot prove, because the damages are uncertain and contingent. But in such cases, he may make his election, and if waiving the *tort*, he demands only the money for which the goods were sold under the execution, the money paid for the goods agreed to be delivered, the sum actually received upon discounting the bill, or what was paid in order to re-

<sup>1</sup> Utterton and Vernon, 3 T. R. 548.

<sup>2</sup> Ibid. 546. 548.

<sup>3</sup> Parker and Norton, 6 T. R. 695.

<sup>4</sup> Johnson and Spiller, Doug<sup>l</sup>. 167.

BOOK III.  
CHAP. III.  
Sect. I.

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deem the debenture, he will be permitted to prove; for then the demand may be ascertained, and he may swear to the amount. And so, it should seem in the case of money remaining in hand, and embezzled by an officer, upon a sale of goods under a distress for rent<sup>y</sup>.

*Equitable creditors.*

An equitable creditor, as the assignee of a bond, &c. though he cannot take out a commission, may prove his debt under it, as well as a legal creditor<sup>z</sup>.

*Creditors of an executor bankrupt.*

*Assets*, whether received and remaining in specie, or unreceived, are not affected by the bankruptcy of an executor<sup>a</sup>, and the creditors and legatees of the testator have no occasion in that case to come in under the commission.

But if the executor has wasted or misapplied the assets, the amount of the *devastavit* may be proved as a debt against the bankrupt's estate, and the testator's creditors and legatees may come in as creditors under the commission<sup>b</sup>. But as the extent of the demand must depend upon the account to be taken of the assets, they cannot come in in

<sup>y</sup> Exp. Dobson, 7 Vin. 74.

<sup>z</sup> Exp. Williamson, 2 Vez. 252.

<sup>a</sup> See below, Chap. V. Sect. I.

<sup>b</sup> Exp. Llewellyn, Co. B. L.

135. Com. Dig. Bankt. D. 3.



the usual summary way, but by application to a court of equity for an account <sup>c</sup>.

BOOK III.  
CHAP. III.  
SECT. II.

A vested legacy, though liable to be divested on the legatee's dying under 21, may be proved on behalf of the infant <sup>d</sup>.

*Costs* of suit incurred by a false plea, in an action brought against a bankrupt as executor, after the bankruptcy, are not proveable; for it is his *own act* which is the *foundation* of such costs, and which amounts to contracting a *new debt subsequent* to his bankruptcy <sup>e</sup>.

See further Sect III. p. 143, 4.

*Creditors of feme-covert.*

The debts of a woman before marriage, become by marriage the debts of the husband, and may be proved under his commission <sup>f</sup>.

*Insurance.*

Soon after the determination in *Tully and Sparkes*, that demands payable on a contingency which might never happen, were not within the 7 Geo. 1. respecting debts payable at a future day, the act of the 19 Geo. 2. was passed, in order to enable the assured in any policy of insurance, and the obligee

<sup>c</sup> Howard and Jemmett, Bl.

<sup>e</sup> Howard and Jemmett, Bl.

401.

400.

<sup>d</sup> Walcott and Hall, 2 Bro.

<sup>f</sup> Miles and Williams, 2 P.

305.

W. 249.

BOOK-III.  
CHAP. III.  
Sect. II.

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in any bottomree (40) or respondentia bond, to make a claim, and after the loss or contingency happened, to prove and receive dividends in like manner as if it had happened before the bankruptcy.

And insurances on *lives*, are held to be within the act<sup>s</sup>, though the preamble is confined to marine insurance; the enacting words being general, viz. "the assured in *any* policy of insurance."

### *Interest.*

It was early established as a rule by the commissioners of bankrupt, that interest should not be allowed to be proved, unless expressly reserved by the terms of the security; and this rule was adhered to by the court of Chancery, as a very reasonable one, upon this ground, that commissioners cannot award damages, and that in the cases where

3 Cox and Liotard, Dougl. 166.

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(40) The word *bottomree*, which, (by what may, perhaps, be considered only as an Anglicism in etymology,) is usually derived from the English *bottom*, may with more probability be referred to two Norman words corresponding to the Latin phrase of *usura maritima*, or sea recompence: *Bot* or *bote*, meaning recompence, compensation, or repair, and *mere*, the sea. Hence *botemere* or *botdemere*, sea compensation; and hence in the law Latin, *botmeria* and *bodmeria*. Heinecc. Pand. IV. 112.

interest is not expressed, it could not be recovered in an action, but in the way of damages only <sup>1</sup>(41).

BOOK III.  
CHAP. III.  
Sect. II.

The rule, however, appears now to be understood, only as applying to distinguish the case of such interest as is due by force of an actual contract between the parties, from that which without such contract, might be given by a jury, as a compensation in damages for the detention of a debt; but not to exclude the proof of interest, merely because it is not *expressed* in the security, provided there appears *other* satisfactory evidence of a contract or agreement between the parties, that the debt should carry interest.

Accordingly it has been held that even upon notes payable on demand, not reserving interest, the interest might be proved where it appeared to be the known and established custom of the trade to allow it, and that it had actually been paid by

<sup>1</sup> Exp. Marlar, 1 Atk. 150.

(41) This is not inconsistent with the cases cited above (see *Damages*), of damages allowed to be proved; for those are only cases founded in contract either express or implied, of such a nature, that the demand may be exactly ascertained, without the intervention of a jury. But where the demand of interest rests merely on the general ground of damages for the *loss* incurred by the *delay of payment*, it may depend upon a variety of circumstances in each particular case, and under which a jury only can properly determine, whether any at all, or at what rate, and to what amount, interest in the shape of such damages shall be allowed.



BOOK III.  
CHAP. III.  
Sect. I.

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the bankrupt, and accounts settled with him, in which it had been charged and allowed between the parties <sup>k</sup> (42).

When interest is allowed to be proved, it is never, in any case of an insolvent estate, allowed to be computed lower than the date of the commission, because, it is said, the estate being a dead fund, a salvage of part to each, is all that in such a general loss can be expected <sup>l</sup> (43).

A mortgagee who applies to have the mortgage sold, and to prove for the residue, is not allowed to compute interest lower than the date of the commission <sup>m</sup>; though where he has no occasion to come in under the commission at all, as where

<sup>k</sup> Exp. Champion, 3 Bro. 436. Exp. Hankey, ib. 504. Exp. Mills, 2 Vez. J. 295.

<sup>l</sup> Bromley and Goodere, 1 Atk. 79. Exp. Bennet, 2 Atk. 528.

<sup>m</sup> Exp. Wardell, and Exp. Hercy, Co. B. L. 181. Exp. Bidger, 4 Vez. J. 165.

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(42) The cases here referred to arose upon solvent estates where there was a surplus, but great part of the reasoning applies equally to the case of insolvent estates: and Ld. Thurlow in exp. Champion observed, that the interest might have been proved originally, upon the ground of the original contract.

(43) Besides this, is there not also a legal objection to the allowance of such further interest, namely that it is a contingent and uncertain debt, accruing only from time to time, as the principal remains unpaid.

his

his mortgage is sufficient to answer both principal and interest, the assignees cannot redeem without paying interest to the time of the redemption<sup>n</sup>.

Upon a pledge of goods for a debt on simple contract, and interest *promised*, the creditor shall have interest to the date of the commission<sup>n</sup>.

But upon a special deposit of goods and stock, the interest is not, as in debts carrying interest, continued down to the date of the commission, but stops from the time of the deposit<sup>n</sup>.

A creditor by bill or note carrying interest may receive the whole interest due, but a specialty creditor can never have interest beyond the penalty contained in his security<sup>n</sup>.

In cases of mutual credit, when both debts carry interest, the computation of interest should stop on both sides at the same time<sup>r</sup>.

*Judgements.* See *Costs of suit*, and *Creditors by marriage articles*.

*Legatees.* See *Creditors of executor*.

*Creditors by marriage articles.*

Provisions for a wife and children, in consideration of marriage, or of marriage and a portion, being calculated for a variety of events which, at

<sup>n</sup> 7 Vin. 110. pl. 3.

<sup>o</sup> Crofley's ca. 7 Vin. 110.

<sup>p</sup> Bromley and Child, 1 Atk.

<sup>q</sup> Bromley and Goodere, 1

Atk. 75.

<sup>r</sup> S. C. ib. 8c.

<sup>259.</sup>

BOOK III.  
CHAP. III.  
Sect. II.

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the time of making them, must necessarily be uncertain and continue so for some length of time, have given rise to a number of cases upon the subject of *contingent debts*.

Where a husband enters into covenants with trustees under marriage articles, to leave his wife a certain sum of money *in case she survive him*<sup>\*</sup>; or to pay them a certain sum *in case he die leaving issue who shall arrive to 21*<sup>†</sup>; or where a father having covenanted, in case his daughter and intended son-in-law should have issue living at the time of his death, to pay a certain sum of money to the son if then living, but if he should die before, then to trustees for the daughter for life, and then for the children, and if none, to any person the son should appoint, and in default to the son's own executors, *and the son* upon his part covenanted that if he received the money at the father's death, his executors should in three months after his decease pay the same to the trustees, *to the like uses*<sup>‡</sup>; or where a *bond* has been given, *payable* upon the like *contingency* of a wife *surviving*<sup>§</sup>; or upon the double contingency of the obligor marrying a particular person, and of her *surviving* him<sup>¶</sup>: in all such cases the courts have held that

<sup>\*</sup> Exp. Groome, 1 Atk. 115.

<sup>†</sup> Exp. Jeffries, 7 Vin. 72.

<sup>‡</sup> Exp. King, Dav. 254.

<sup>§</sup> Exp. Bailey, cited 2 P. W.

498. Exp. Caswell, ib. 497. Exp.

Mitchell, 1 Atk. 120. S. C. cited

3 Will. 271. Anon. cited ibid.

<sup>¶</sup> Tully and Sparks, Id.

Raym. 1546. Str. 367.

demands



demands so manifestly in their nature contingent and uncertain, could not be proved under a commission taken out before the contingencies on which they were made *payable* respectively, had taken effect.

Nor will the trustees be admitted to prove where the money is made payable, upon the party's failing in the world, becoming insolvent, or a bankrupt<sup>2</sup>: the debt in this case, from the very nature of the contingency, does not arise till *after* the bankruptcy<sup>3</sup>.

But, if there is a *remedy at law, before* the bankruptcy, as where by way of security, the party covenants to pay money immediately, or gives a *bond* with a *penalty*, and there is a breach of the covenant, or the penalty is *forfeited* at law, before the bankruptcy, the court will take hold of the *legal* right, to enable the trustees to come in immediately as creditors under the commission<sup>b</sup>. Or if he confesses a *judgement* for it<sup>c</sup>; which is an immediate debt at law, notwithstanding a defeazance, for this suspends it only in equity, and the trustees will be admitted as creditors, though the terms of the *bond* itself be otherwise<sup>d</sup>. And if upon a bond with a penalty, the principal sum is to be paid at an *uncertain* time, but with interest in *the mean*

*time,*

<sup>2</sup> Exp. Hill, and Exp. Bennet,  
Co. B. L. 232, 3.

<sup>a</sup> 2 Bro. 599.

<sup>b</sup> Exp. Winchester, 1 Atk.  
116. 9 Mod. 471.

<sup>c</sup> 1 Atk. 117. 121. Exp. Smith,  
Co. B. L. 213.

<sup>d</sup> 1 Atk. *ibid.*

BOOK III.  
CHAP III.  
Sect. II.

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*time*, at fixed periods, acceptance of the arrears, after a forfeiture once incurred by non-payment of the interest at the day, is not considered as a *waiver* of the forfeiture, within the statute of Anne <sup>e</sup>, so as to deprive the creditor of relief under the commission <sup>f</sup>.

When proofs of this kind are admitted, the court will take care that the interest of the money, during the time the bankrupt himself may be entitled to it, is paid to the creditors under the commission, and the principal secured for the wife or other party, until it is seen whether the contingency take effect; and then, according to the event, that it is applied either to the purposes of the trust, or distributed amongst the general creditors <sup>g</sup>.

A covenant with trustees, to pay them a certain sum by periodical instalments, so as that the whole should be paid in a given time, if the bankrupt should so long live, and if he should die, to pay the whole within a year after his decease, if the wife or any child of the marriage then living; and if not, then only one half; has been held not contingent, but certain, at least as to one half <sup>h</sup>.

*Creditors having a mortgage or pledge. See Interest, and Sect. III.*

<sup>e</sup> 4 & 5 Ann. c. 16. Sect. 12.

<sup>f</sup> 1 Atk. 118. See *Annuities*.

<sup>g</sup> 2 P.W. 497. 1 Atk. 117.

<sup>h</sup> Exp. Mitford, 1 Bro. 398.

*Rent.*

*Rent.*

Although the statute of the 8 Anne, c. 14. directs, that upon all executions of goods being on any premises demised to a tenant, one year's rent shall be paid to the landlord, and a commission of bankrupt is considered in some respects as in the nature of a statute execution, yet a landlord is held not to be within the equity of that statute; so as to be allowed a year's rent in preference to other creditors, where he *neglects to distrain while* the goods remain on the premises; but must in such cases come in under the commission with the rest of the creditors<sup>b</sup>.

On the other hand, as that statute makes no provision for the case of bankruptcy, and the landlord's remedy is not taken away by any of the statutes of bankrupt, but remains as it was before at common law, he *may* distrain while the goods remain upon the premises, for his *entire* rent, be the quantum what it may: either after the messenger is in possession, and before assignment<sup>i</sup>; or after assignment, and when the assignees are in possession, for the assignment only changes the

<sup>b</sup> Anon. 1 Atk. 102. Exp. Descharmes, ib. 103. Exp. De-  
vise, Co. B. L. 176.

<sup>i</sup> Anon. 1 Atk. 102. Exp. Jaquez, ib. 104. Exp. Grove, ib.

*property;*



BOOK III.  
CHAP. III.  
Sect. I.

*property*<sup>\*</sup>; or even after assignment and sale, if the goods are not removed<sup>1</sup>(44).

<sup>\*</sup> Anon. ib. 102. Exp. Dillon,  
ib. 104. Exp. Grove, ib.

<sup>1</sup> Exp. Plummer, ib. 103.

(44) In 1 Atk. 102. it is said that if the landlord suffers the goods to be *fold* by the assignees, he cannot afterwards distrain. But it should seem that this must be understood of a removal, as well as sale, and Ld. Hardwicke in exp. Plummer lays down expressly the right to distrain even after *sale*, if the goods are *not removed*: which seems to agree with the reason given why the *assignment* does not preclude the landlord's remedy; namely, that the assignment only changes the *property* of the goods, but which still remain liable *while* upon the premises. In exp. Grove, where the goods had been sold to one who lived in the tenant's house, and the landlord, three years after proving under the commission, had distrained upon them, being still on the premises, Ld. Hardwicke thought the vendee entitled to the goods, and restrained the landlord to his relief under the commission. Ld. Bathurst (in exp. Devisme, according to Mr. Cook's report of the case), said that Ld. Hardwicke's opinion went on the circumstance of the goods having been *fold*, and that he took *no notice* of the landlord's having proved under the commission. This, however, is directly contrary to the report in Atkins, which seems very explicit and circumstantial, and the other circumstances of the case seem to afford a very good reason, independent of the circumstance of *sale*, why the landlord should not be suffered to distrain, though the goods were still on the premises; namely, that after lulling the assignee and vendee into security, by a three years acquiescence under the commission, and leaving the vendee in the undisturbed enjoyment for so long a time, he might be considered as having abandoned his remedy at law, and ought not to be allowed to come afterwards upon the vendee by surprize.

A land.

A landlord, however, cannot distrain and come in under the commission too, at one and the same time; but is put to his election either to waive his proof or his distress<sup>m</sup>. But it seems, that his proving his debt is no determination of his election; and that he may notwithstanding, afterwards distrain the goods remaining on the premises, and waive his proof, in like manner as a common creditor, even after he has received a dividend, is allowed upon refunding the dividend, to bring an action at law for his debt<sup>n</sup>.

BOOK III.  
CHAP III.  
Sect. II.

---

It has been said<sup>o</sup>, that a mortgagee paying the arrears to the landlord, shall not be preferred to other creditors, unless he applies for an order to stand in the place of the landlord; but Mr. Cook<sup>p</sup> justly observes, that it rather seems no such order could be obtained, as the landlord, unless he actually distrains, has himself no lien upon the goods.

In general, a landlord cannot distrain till the rent becomes due, commensurate with the time of enjoyment of the premises: but if under a custom in the country that half a year's rent shall become due on the day the tenant enters upon the premises, the tenant agrees to pay half a year's rent in advance, the landlord is entitled to distrain on that day<sup>q</sup>; and even without distraining, if he pur-

<sup>m</sup> Exp. Grove, ib. 105.

<sup>n</sup> Ibid.

<sup>o</sup> 1 Atk. 103.

<sup>p</sup> Co. B. L. 179.

<sup>q</sup> Buckley and Taylor, 2 T. R. 600.

BOOK III.  
CHAP. III.  
Sect. II.

chafes the goods sold upon the premises by the assignees, he may retain out of the price the amount of his rent<sup>r</sup>.

Nothing but arrears actually due at the time of the bankruptcy, can be proved as a debt under a commission. The *growing* payments are uncertain and contingent, and though the bankrupt after his bankruptcy remains still liable upon his covenant, yet under a covenant it is uncertain whether any rent will ever become due<sup>s</sup>. Entry and eviction would excuse the tenant.

*Stock (contracts to replace). See Covenants and Agreements, Bonds, Damages.*

#### *Sureties.*

A surety may be considered, either as a debtor along with the principal, to the principal creditor, or as himself a creditor of the principal debtor: and as, in either case, the engagement may be either unqualified, or conditional; so the debt arising upon it will be proveable or not, according as it happens to be in either case respectively, absolute or contingent.

1. As between the creditor and the surety.

If a surety *joins* with the debtor in a bond payable by instalments, and before the first default,

<sup>r</sup> S. C. *ibid*.

<sup>s</sup> *Ld. Kenyon, 3 T. R. 544.*

becomes



becomes bankrupt; the creditor may prove the bond under his commission, like any other debt payable at a future day under the 7 Geo. 1; for though the debt was not originally the surety's, yet having made himself a principal, he is equally liable<sup>1</sup>.

BOOK III.  
CHAP. III.  
Sect. II.

---

So if one lends his name to a bill of exchange or promissory note, merely as a surety, yet he thereby makes himself an absolute debtor to any holder for a valuable consideration.

But if a surety's engagement is *conditional* only, to pay *in default* of the principal, the debt is contingent, till default made; and cannot be proved against the surety, *unless* default has been made by the principal *before* the bankruptcy of the surety. As where one gave a promise in writing, in consideration of a premium, to be answerable for the due payment of a note of hand of the principal debtor, and became a bankrupt *before* the note of hand fell due: it was held, that the creditor could not upon this undertaking prove the value of the note, under the surety's commission<sup>2</sup>.

So where one gave an engagement in writing, to warrant the payment of a bill, in like manner as if he had indorsed it, this was held to be only a contingent debt; and as such, not proveable against

<sup>1</sup> Brooks and Lloyd, 1 T. R.

<sup>2</sup> Exp. Adney, Cowp. 460.

BOOK III.  
CHAP. III.  
Sect. II.

the surety who became bankrupt before the bill fell due. The holder must have an actual indorsement, to bring him within the statute of Geo. 1<sup>st</sup>.

Or if a surety joins in a bond, with a condition that the principal, his executors, or administrators, shall repay the money within 20 days after the expiration of five years, in case he shall so long live and enjoy the benefit of the loan, and if he die before, then that his executors, &c. shall repay it, within three months after his death, it is not proveable under a commission against the surety, before a forfeiture by breach of any of the conditions, which are in their nature contingent <sup>y</sup>.

Or if one who is *bail* for another, becomes a bankrupt before he is *fixed*; or, as in the case of bail in error, before the judgement is *affirmed*; the principal creditor cannot prove under his commission <sup>z</sup>.

## 2. As between the surety and the debtor.

The mere becoming a surety for another, does not make the former *immediately* a creditor of the latter. Though the surety makes himself *liable*, and may make himself liable *absolutely* and at all events to the creditor; and though the debtor undertakes to *indemnify* the surety, yet neither this liability on the one hand, nor the promise to in-

<sup>x</sup> Exp. Harrison, 2 Bro. 615.

<sup>y</sup> Alfop and Price, Dougl. 160.

<sup>z</sup> Hockley and Merry, Str.

1043.

demnify

indemnify on the other, raises any immediate *debt* from the principal to the surety: as between whom, no *debt* arises or has any *existence*, but remains wholly *contingent*, until the surety has actually paid the money: and therefore *unless* the surety has *actually paid before* the bankruptcy of the principal, he cannot prove under his commission.

BOOK III.  
CHAP. III.  
Sect. II.

Thus one who becomes *bail* for another upon an undertaking by the latter to indemnify him, cannot prove under a commission against the latter, if he has not paid the debt and costs till *after* the bankruptcy<sup>a</sup>; nor even although an action upon the bail bond should have been brought against him, and judgement obtained upon it *before*; for the *debt* to him as a *surety* accrues only by *actual payment*<sup>b</sup>.

Or if a surety joins in a bond, with a penalty to pay at a future day certain, he cannot prove if he has not actually paid till after the bankruptcy; although the penalty was forfeited before<sup>c</sup>.

Or joins in a warrant of attorney to confess judgement, with a defeazance for paying by certain instalments; and after the instalments become due, and *after* the bankruptcy of the principal debtor, the surety pays a part of the debt, he cannot prove although the instalments were due and the surety

<sup>a</sup> Smithson and Johnson, den, 3 Will. 262. S. C. Bl. 794.

<sup>b</sup> Taylor and Mills, Cowp.

<sup>c</sup> Goddard and Vanderhey- 525.



BOOK III.  
CHAP. III.  
Sect. II.

---

was applied to for payment *before* ; he not having *actually paid* till *after* the bankruptcy <sup>d</sup>.

In an action, in which the bankrupt before his bankruptcy was defendant, an attachment had issued against the sheriff; and the defendant proposing to pay the debt and costs in the action, on or before a certain day, gave the sheriff a warrant of attorney authorizing him to enter up judgement in debt, as for a specific sum borrowed, with a defeazance that judgement should not be entered up, unless on default made by the defendant in payment of the debt and costs in the action, at the day fixed. Before the day, the sheriff was obliged to pay for the defendant, but not till after the latter had committed an act of bankruptcy. This was held to be purely a contingent debt before the bankruptcy, and the sheriff not having actually paid till after, it was not proveable under the commission <sup>e</sup>.

Where a son, whose father was tenant for life of a settled estate with remainder to the son in tail, joined in suffering a recovery and in giving a mortgage to raise money for the father, and the father afterwards became a bankrupt, but the mortgaged estate was not sold till *after* the bankruptcy: it was held that the son could not prove his proportion of the money raised by sale of the estate, as a debt under the father's commission:

<sup>d</sup> Paul and Jones, 1 T. R. 599.

<sup>e</sup> Staines and Planck, 3 T. R. 386.

this not being distinguishable from the common case of a surety joining in a bond, or giving a collateral bond to secure the debt of another, and which is not paid till *after* the bankruptcy<sup>f</sup>.

BOOK III.  
CHAP. III.  
Sect. II.

And it is the same with respect to bills of exchange and promissory notes. So where a person accepted a bill to accommodate the drawer, upon a parole promise by the latter to find money for taking it up when due, and to save the acceptor harmless, but who did not take it up when it fell due, and soon after became bankrupt, and the acceptor, *after* the bankruptcy of the drawer, was sued upon the bill, and taken in execution for the debt and costs; it was held that no *debt* accrued to him from the drawer, *till* he paid the debt and costs, or (which was the same thing as actual payment), till he rendered his body in satisfaction thereof; and that this not being till *after* the bankruptcy, could not be proved under the commission against the drawer<sup>g</sup>.

And it makes no difference if, instead of a parole promise, the surety takes a promise in writing from the drawer, that he will take up the bill when due<sup>h</sup>.

And without any express contract of *indemnity* merely, between the parties; if one puts his name

<sup>f</sup> Kettcar and Raynes, 1 Bro. 384.

<sup>g</sup> Chilton and Whiffin, 3 Willf. 13. S. P. Young and Hockley, Bl. 839. 3 Willf. 346.

<sup>h</sup> Vanderheyden and De Pailon, 3 Willf. 528. S. P. Heskuyson and Woodbridge, Dougl. 166.

BOOK III.  
CHAP. III.  
Sect. II.

---

to a bill or note without a consideration, though he thereby makes himself liable absolutely to a *bonâ fide* holder, yet as to him for whose accommodation he has lent his name, he is merely a surety, and no debt arises to him upon it, till he has actually paid or taken up the bill<sup>i</sup>. As where the payee of a bill of exchange, not being before a creditor of the drawer, indorsed, and got it discounted merely for the purpose of raising money for him, and was afterwards obliged to pay it to the indorsee, but not till *after* the drawer was become bankrupt; it was held that he could not prove it under the drawer's commission, for that no *debt* accrued to him from the drawer, till the money was actually paid, which was not till after the bankruptcy: and it was likened to the cases of Chilton and Whiffin, Young and Hockley, Vanderheyden and De Paiba, &c.<sup>k</sup>.

Where the payee of a promissory note indorsed it, and the maker delivered it to a third person, with the payee's indorsement, and afterwards became bankrupt; it was held, that the payee and indorser, paying it *after* the bankruptcy, was not entitled to prove; his *debt*, accruing only upon *payment* of the note<sup>l</sup>. And the case of Vanderheyden and De Paiba was relied on.

<sup>i</sup> 1 Atk. 123, 4. Exp. Marshall, ib. 130.

<sup>k</sup> Brookes and Rogers, 1 H. Bl. 640.

<sup>l</sup> Howis and Wiggins, 4 T. R. 714.

But



But if the surety, takes at the same time, for his own security from the principal, a bill, or note<sup>m</sup>, or bond<sup>n</sup>, for a sum of money payable at a day certain, he will be allowed to prove immediately upon such counter security; though the debtor becomes a bankrupt before such counter security is payable, and before the surety himself has paid, or been called upon, or even could by the terms of his engagement, be called upon to pay to the creditor. Such a construction, however it may appear to common apprehension repugnant to the real truth of the transaction, and the real justice of the case as between the parties, has been founded upon this: that such a counter security creates an absolute debt at law, for which the surety's liability is a sufficient consideration, and on which, therefore, he is entitled to come in immediately as a creditor under the commission (47). With a view, at the same time, to prevent the injury which might be done to *real* creditors, by allowing such constructively absolute, but really contingent creditors to

<sup>m</sup> Exp. Maydwell, Co. B. L. 159. S. C. 2 H. Bl. 570. Exp. Beaufoy, Co. B. L. *ibid.* Exp. Clanricarde, *ibid.* Rolfe and Callon, 2 H. Bl. 570.

<sup>n</sup> Toussaint and Martinant, 2 T. R. 100. Martin and Court, *ibid.* 640. Hodgson and Bell, 7 T. R. 97.

(47) See Cowley and Dunlop, 7 T. R. 565. in which the court was divided upon a question of the effect of mutual acceptances.

BOOK III.  
CHAP. III.  
Sect. II.

receive dividends upon debts which may never exist but *in law*, it has been thought necessary, where there are cross demands between the surety and the bankrupt, upon counter paper as it is called, and upon which, till either has actually paid, they are substantially only sureties, though nominally creditors of each other, to suspend the dividends until it appear what the surety actually pays, and how far he exonerates the bankrupt's estate from his own paper ° (48).

If,

° Exp. Curtis, Co. B. L. 159. Exp. Lee, *ibid*.

(48) If the principle laid down in *Touffaint and Martinant* and other analogous cases, which admit the surety to prove upon his counter security before by the terms of the principal security he could be called upon by the creditor, were to be adhered to in its full extent, it may seem doubtful whether even the dividends could be so withheld. If he may *prove* in such a case, because, as it is said, he has chosen to lend his credit only for a certain time, and expressly provided for having the money in his hands *before* he could be called upon; would he not be equally entitled upon the same reasoning, to be paid his *dividends*? In point of fact, in that case the surety did actually levy the debt and costs by execution; which it was held he might do, and that if he was not afterwards obliged to pay the principal creditor (that is, if the debtor paid him himself), then the debtor (after paying the debt and costs twice over), would have the *benefit of a bill in equity* against the surety to make him *refund*. This excess of favour to the surety, however, is only at the expence of the debtor, but the case seems to hold out to him a like degree of favour at the expence of the creditor: for upon the subject of the difficulty which naturally occurred in that case, how to prevent

If, however, the security which the surety takes, is not absolute, but conditional only, as in the case of

BOOK III.  
CHAP. III.  
Sect. II.

vent a double proof under the commission, upon the same debt, it was suggested that one way might be to compel the *creditor* to make his election to which of the two securities he would resort; or where the whole sum had been proved upon one, to compel the party in possession of the other to give it up. But upon what principle compel the *creditor* to make such election, or compel him to give up his bond in any case till fully satisfied? Is it not contrary to the common rule in bankruptcy (2 Atk. 528.), and is he not entitled, whether he receives a dividend upon his own proof, or by the intervention of a proof made by the surety, still to recover against the surety whatever the dividends may fall short of twenty shillings?

Such are some of the difficulties which present themselves, when breaking in upon that plain line of distinction which so long governed in bankruptcy between Certain and Contingent debts, between debts before and debts subsequent to the act of bankruptcy. However a surety's debt may, upon his counter-security, be absolute in point of form, yet it should seem there can be no doubt that till he has actually paid, it is truly and substantially contingent, and that unless he has actually *paid before*, the *real* debt is *subsequent* to the bankruptcy. At the same time, what with the construction adopted in favour of a wife and children under marriage articles, and extended afterwards to annuitants in general; that adopted in favour of sureties taking absolute counter-securities; that in favour of those taking only conditional ones, and on which the condition is broken only by the debtor's not paying the principal, but not by the surety's having paid for him (Hodgson and Bell *infra*.); and lastly by the permission given to any surety to have the benefit of the creditor's proof, and even to compel him to prove for his benefit (Beardmore and Cruttenden *infra*), the line of distinction



BOOK III.  
CHAP. III.  
Sect. II.

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of a common bond to indemnify, against non-payment by the debtor to the principal creditor; the debt remains still contingent, until the surety has been actually damnified<sup>P</sup>. At least where there has been no breach of the condition before the

<sup>P</sup> Martin and Court, 2 T. R.

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tion alluded to is in effect nearly abolished as to all the principal classes of contingent debts; and in some instances mere paper creditors admitted on subtleties of law to share the estate with those who have *before* the bankruptcy either actually advanced their money, or parted with specific property to the bankrupt.

Since writing the above, the case of *exp. Walker* has been published (4 Ver. jun. 373.), in which *Ld. Loughborough* determined that where there was cross paper between two houses, both of which became bankrupt, no proof could be made by the one estate against the other, in respect of the excess of damage eventually sustained by the one, by dividends paid upon the bad paper of the other *subsequent* to the bankruptcy: that the difference of damage according to the different dividends which the one or the other happened to pay respectively after the bankruptcy, was all chance: that as between the two estates, the account must be taken as if all the bills on either side had been good; and that the actual debt between them must be considered as it existed, upon that supposition, at the time of the bankruptcy. His Lordship also said, that in *Touffaint and Martinant*, the bond of indemnity *could not* be proved, for at the time of the bankruptcy there was *no debt*: that the court would not suffer execution to be taken out upon that judgement, when there *was no debt due*: that the bond could only be taken to be a fraud upon the bankruptcy, and that was the use that was made of it.

In the same report is cited *exp. Browne*, where his Lordship held that the surety could not prove upon his counter-bond till the principal bond was delivered up.

bank-

bankruptcy, the surety clearly cannot prove<sup>9</sup>. But it has been laid down that, though the condition is broken before the bankruptcy, by the debtor's failing to pay the principal creditor at the stated time; yet even in that case, the surety has at most only a cause of action, and a cause of action only is not proveable, but that no certain *debt* arises, to which he can possibly *swear*, unless he has actually paid a *certain* sum of money, by reason of the breach of the condition<sup>1</sup>.

But this seems to be contradicted by some late determinations: in one of which<sup>2</sup> it was held, that an indemnity bond being once forfeited, by the surety having been obliged to pay part of the debt *before* the bankruptcy, he was entitled to include in his proof, also payments made *subsequent* to it.

And in a still later case<sup>3</sup>, it was held to be quite indisputable, that if a bond to indemnify is forfeited *before*, the surety may prove the whole, though he does not pay at all, till *after* the bankruptcy: the penalty creating a debt at law, of which the court will take advantage to enable the party to come in under the commission, in like manner as in the cases of Annuitants, and Trustees under marriage articles (49).

#### A receipt

<sup>9</sup> Crookshank and Thomson, Str. 1160.

<sup>2</sup> Exp. Cockshott, 3 Bro. 502.

<sup>3</sup> Hodgson and Bell, 7 T. R.

<sup>1</sup> 3 Will. 270.

97.

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(49) In these cases of annuitants and trustees, the *amount* at least of the *real* debt is perfectly ascertained, and the only contingency

BOOK III.  
CHAP. III.  
Sect. II.

---

A *receipt* for acceptances, as for money received, is not such a counter *security* as creates a debt capable of being proved<sup>u</sup>.

*Creditors of trustee a bankrupt.*

When a trustee makes use of a trust fund, it is the common rule in equity, that he shall either replace it, or account for what he made of it, as may be most for the benefit of the cestui que trust. If, therefore, a trustee of money in the funds, sell it for his own benefit and become bankrupt, and the price of the stock has risen between the time of selling, and the date of the commission, the proof will be allowed for what it would have cost the bankrupt to have replaced it at the time of the bankruptcy<sup>x</sup>.

If two persons being trustees under a will, of money in the funds, sell out for the benefit of one of themselves, who having given an undertaking in writing to replace it on demand, becomes insolvent,

<sup>u</sup> Smith and Gells, 7 T. R.

<sup>x</sup> Exp. Shakeshaft, 3 Bro. 197.

tingency is in the *event*, upon which it is made payable. In those of sureties the whole is uncertain, and depends, amongst other things, upon the contingent ability or goodwill of the surety to pay, when or how much he can, or chuses, or may be called upon to pay. And it is upon this contingency and uncertainty of the amount of the *real* debt, that the doctrine laid down in the case cited above from 3 Wils. seems to be founded.

and



and the other becomes bankrupt; the debt may be proved against the estate of the bankrupt, though the other estate be first liable<sup>y</sup>.

BOOK III.  
CHAP. III.  
Sect. III.

SECT. III.

*Conditions and manner of proof.*

Some parts of this subject have necessarily been anticipated in the preceding section; but what remains is of sufficient extent to require a separate consideration.

1. *Time of proving.*

Although by the 1 Ja. c. 15. creditors were allowed to come in and prove their debts, at any time within four months, and until distribution made; it was for some time held, that they could not be admitted after distribution actually made, of any part of the estate<sup>z</sup>, unless under particular circumstances<sup>a</sup>. This strictness, however, was afterwards in some degree relaxed<sup>b</sup>; and now, since the later statutes by which considerable alterations have been made as to the time and manner of making the dividend, the court has been very liberal in admitting creditors, and allowing them, except in cases

<sup>y</sup> S. C. *ibid.*

<sup>z</sup> Hob. 287. Hutt. 38.

<sup>a</sup> Good. 43.

<sup>b</sup> 2 Cha. ca. 154.

of

of gross laches<sup>c</sup>, to come in at any time, while any thing remains to be divided<sup>d</sup> (50).

2. *The kind of proof required.*

By the 21 Ja. c. 19. the commissioners are empowered to examine upon oath, *or by any other ways or means that to them shall seem meet*, as to the truth and certainty of the several debts owing to creditors seeking relief under the commission. Under this authority, the usual proof required, is the oath of the creditor himself; either in person, or as directed by the 5 Geo. 2. by affidavit, in case he lives remote from the place of meeting, or is resident in foreign parts. At the same time, as it must necessarily happen in some cases, without any fault of the creditor, that he can neither be examined himself, nor make an affidavit before a dividend is to be declared; and that though a claim is entered, yet it cannot be substantiated as a proof within the proper time; as where a debt is claimed upon a balance of accounts not settled, and which from the claimant's residence abroad, it is impossible to

<sup>c</sup> Exp. Peachy, 1 Atk. 111.

<sup>d</sup> 1 Atk. 79. Exp. Stiles, ib. 208.

(50) Under the statute of James, creditors were required also to contribute or tender contribution to the charges of the commission; but this was repealed by the 5 Geo. 2. and the charges of the commission directed to be paid out of the estate.

have

have examined and adjusted so as to enable him to prove in the regular way within the time appointed for a dividend : in such cases<sup>e</sup>, in order to prevent the injury which might otherwise be done to a fair creditor, it becomes necessary to dispense with the oath or affidavit of the party himself, and to admit such other and collateral proof as he may be able to make. And the words of the statute seem expressly to give the commissioners the power of exercising a discretion of this kind.

The oath of the creditor, is sufficient in ordinary cases ; but the commissioners are not bound to admit the proof, merely because the debt is positively sworn to ; and if any fair objection is made, or they have just reason to doubt of the truth or legality of the debt, they may either admit it only as a claim, or disallow it altogether<sup>f</sup>. An appeal lies from their determination to the great seal<sup>g</sup>; but after a proof has once been admitted, it will be conclusive, unless objection is made to it within a reasonable time<sup>h</sup>.

When a creditor comes, before assignees are chosen, to prove a debt on the balance of an *open account*, the commissioners, in order to avoid either the hardship of excluding him, who may perhaps be the largest creditor, from a voice in the chusing of assignees, or the inconvenience of postponing the choice till the account is taken, which may be

<sup>e</sup> Exp. Young. Co. B. L. 113.<sup>g</sup> Ibid. 77.<sup>f</sup> 1 Atk. 71. 222.<sup>h</sup> Ibid.



BOOK III.  
CHAP. III.  
Sect. III.

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a work of time, are not bound to examine critically into the debt, but may admit him upon his oath for what he swears to be due; as he will still be liable to an account afterwards, and when that is taken, will be entitled to a dividend, only on what appears to be really due upon the balance<sup>1</sup>. But still the commissioners may, in this as in other cases, if they see any reasonable ground of objection, disallow the proof altogether<sup>2</sup>.

Although no debt is regularly proveable, but such as existed at the time of the bankruptcy, the form of the creditor's deposition is only, that it was due and owing before the date of the commission; and it is said to be for the purpose of letting in all creditors before that time, and of preventing disputes about the time of the bankruptcy, that the commissioners in their declaration determine this no otherwise than by finding the party a bankrupt before the date and suing forth of the commission<sup>3</sup>. But if it plainly appears to have been contracted subsequent to the act of bankruptcy, though before the commission, it cannot be admitted<sup>4</sup>.

### 3. *In whose person the proof should be made.*

It has been mentioned already that a debt can only properly be proved, by the person in whom the legal right to the debt is vested.

<sup>1</sup> Exp. Simpsons, 1 Atk. 68.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> 1 Atk. 78. Forr. 243.

<sup>5</sup> See Exp. Moore, 2 Bro. 599.

This,

This, however, is necessarily dispensed with in the case of aggregate bodies, as corporations or companies, who are generally therefore admitted to prove by a treasurer, clerk, or other officer duly authorized and appointed<sup>a</sup>. So where a bankrupt is in arrear for taxes, the collector seems the proper person to prove for the parish<sup>b</sup>. And if the collector himself, being indebted for money had and received by him in that capacity, becomes bankrupt, one parishioner will be allowed to prove for himself and the rest of the parishioners<sup>c</sup>: for though he cannot directly swear that no other inhabitant of the parish has received any security or satisfaction, it is enough that he can swear that neither he nor any other has, to his knowledge or belief<sup>d</sup>.

In the case of assignees of a bankrupt, or the assignee of a bond or debt, the bankrupt and the assignor respectively are required to join in the deposition<sup>e</sup>.

An executor become a bankrupt, and having wasted or misapplied the assets, is considered himself as the proper person to prove against his own estate *on behalf* of the testator's creditors and legatees; for he does this in *autre droit*: but the court will direct the assignees to pay over the dividends into the bank<sup>f</sup>.

<sup>a</sup> Green 117. 125.

<sup>b</sup> Ibid. 116.

<sup>c</sup> Exp. Child, 1 Atk. 117.  
Exp. Muggeridge, Co. B. L. 125.

<sup>d</sup> Exp. Child, *ibid*.

<sup>e</sup> Green 149.

<sup>f</sup> Exp. Leeke, 2 Bro. 596.

BOOK III.  
CHAP. III.  
Sect. III.

If a bankrupt and another person are executors of a creditor of the bankrupt, the other executor will be allowed to prove the debt against the bankrupt's estate, though a suit is pending in the ecclesiastical court as to the executorship; and the court will order the dividends to be paid into the bank pending the contest in the ecclesiastical court<sup>1</sup>.

A testator having bequeathed a sum of money, upon condition of paying an annuity, and in case of default that the executrix should call in the whole, the executrix and not the annuitant was admitted to prove for the principal sum, upon the annuity being in arrear<sup>2</sup>.

Where there are trustees, they ought to prove on behalf of the *cestuique* trusts, and if the bankrupt himself is the trustee, the court will allow some other person to prove *on behalf* of the parties interested, in order to secure the fund till it is seen to whom it belongs, and will direct the assignees to pay the dividends into the bank, subject to future order<sup>3</sup>.

A guardian may, on petition, be admitted to prove on behalf of an infant<sup>4</sup>.

#### 4. *Creditor having a security.*

The principal object attended to both in the statutes, and in the rules which have been laid

<sup>1</sup> Exp. John Shakeshaft, 3 Bro. 198.

<sup>2</sup> Exp. English, 2 Bro. 610.

<sup>3</sup> Exp. Shakeshaft, 3 Bro. 197.

<sup>4</sup> Exp. Belton, 1 Ask. 251.

Walcott and Hall, 2 Bro. 305.

down,



down, whether by the court of Chancery or by the commissioners, as to the conditions on which different creditors may be admitted to prove, has always been to place those seeking the benefit of the commission, as nearly as possible, on a footing of equality.

BOOK III.  
CHAP. III.  
SECT. III.

---

By the 21 Ja. c. 19. s. 9. no creditor having a security by judgement, statute, or recognizance, &c. or having made attachment by the custom of London or other place, whereof execution or extent is *not served and executed before* the bankruptcy, shall be relieved for more than a rateable proportion with the other creditors, and without respect to any penalty contained in the security.

With a similar view, the commissioners require that every creditor who desires to prove, shall swear whether he has any security or not: and if he has obtained an effectual security upon any part of the bankrupt's property, as a mortgage or a pledge before the bankruptcy, or has a lien upon any part of the effects; although he is not compellable to come in under the commission, and relinquish the advantage he has obtained, yet he will not be allowed both to prove his *whole* demand under the commission, and retain his particular security, or take the benefit of his lien, at the same time. If he insists upon proving, he must deliver up his security, or relinquish his lien, for the benefit of all the creditors under the commission <sup>2</sup>.

<sup>2</sup> 1 Atk. 105.

BOOK III.  
CHAP. III.  
Sect. III.

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And this rule has been applied to creditors having securities upon the bankrupt's property in *other* countries, as well as upon property in this. By the law of *Scotland*, the assignment of a debt, with *intimation* (that is notice), to the debtor, gives the assignee an effectual lien upon that specific debt. Accordingly creditors obtaining in *Scotland* such assignments of debts due to the bankrupt, and *intimated* to the debtors before the bankruptcy, were held by Ld. Hardwicke to stand in the same situation as creditors claiming by mortgage; and to be not entitled to come in under the commission without accounting for what they had taken under their specific securities<sup>a</sup>. And a creditor having attached property in *America*, has not been admitted to prove without giving up his attachment<sup>b</sup>.

But the necessity of this alternative is confined to the case of a security given by the bankrupt alone; a *joint* security from the bankrupt and another, the creditor is not obliged to deliver up, being entitled to recover what he can of the co-security, and prove his *whole* debt at the same time under the commission<sup>c</sup>: provided he has not received part before he comes to prove, and so as that in any way he shall not receive more than twenty shillings in the pound upon his whole debt<sup>d</sup>.

<sup>a</sup> See Sill and Worfwick, 1 H. Bl. Le Chevalier and Lynch, Dougl. 170.

<sup>b</sup> Exp. Smith in re Frank, Co. B. L. 308.

<sup>c</sup> 2 Atk. 528.

<sup>d</sup> 1 Atk. 110.

A creditor,

A creditor, however, who has a *mortgage* or a *pledge*, or who has obtained an *effectual lien* upon a part of the bankrupt's property, may have an order for its being *sold*, and the produce applied in payment of his debt and costs; and if that is not sufficient to discharge it, will then be admitted as a creditor under the commission for the *deficiency*<sup>e</sup> (51). And *bonds*, *bills* of exchange, or other personal securities, pledged or deposited with a creditor, may be sold in the same manner as goods pledged, or a mortgage<sup>f</sup>; and the creditor admitted to prove for the residue.

A creditor obtaining goods of the bankrupt, a few days before he failed, and on suspicion that he was about to do so, will not be allowed to prove, without giving up the goods<sup>g</sup>.

Where effects are assigned or deposited as a security, *generally*, without any *specific appropriation*; the creditor having distinct demands one of which is proveable under the commission, and

<sup>e</sup> Exp. Howell, 7 Vin. 101.

Co. Bl. 119, 120.

<sup>f</sup> Atk. 164. 2 Atk. 528.<sup>g</sup> Exp. Smith, 3 Bro. 46.<sup>h</sup> Exp. Hillier and Exp. Smith,

(51) This was formerly done on petition to the Chancellor in each particular case; but by general order of Lord Loughborough, the mortgagee may, without petition to the Chancellor, apply to the commissioners, who are directed thereupon to take the account, and order the mortgage to be sold before them, or by public auction at any other place, if they shall so think fit, and to admit the creditor to prove for the deficiency, &c. See Appendix.



BOOK III.  
CHAP. III.  
Sect. III.

the other not, as where he obtains a security for monies before then advanced, and also for future advances, but which are not actually made till after the bankruptcy, will not be obliged to apply the effects in liquidation and diminution of the debt proveable under the commission, namely of that due before the bankruptcy: but will be allowed to apply them first in satisfaction of the debt accruing after the bankruptcy, which he cannot prove under the commission, and to come in under the commission for the whole of the other<sup>h</sup>.

5. *Creditor proceeding at law.*

A commission is often compared to an execution<sup>i</sup>, but in as far as it is a proceeding for the satisfaction of debts, it is an execution against the effects only; the proceedings against the person being only to compel that surrender and discovery of the effects which cannot be obtained by other means; and to which if the bankrupt conforms, in the manner required by the statutes, he becomes entitled to the absolute discharge of his person. At the same time, though after the issuing of a commission, the creditors have no other remedy against the effects, they are not therefore deprived of their right (before the bankrupt obtains his discharge) to proceed against his person as before, and are still at liberty, either to come in and take a proportionable benefit

<sup>h</sup> Exp. Havard, — Arkley,      <sup>i</sup> 1 Atk. 151.  
Co. B. L. 120. 122.

under the commission, or to proceed against the person in the ordinary course of law. But they are not allowed, both to come in under the commission, and to sue the bankrupt at law likewise<sup>k</sup>: for this would be to counteract the very end of the legislature in compelling the bankrupt to surrender all his property, and to make the discovery required of him under the commission; and would be giving the creditor a double advantage, without any commensurate benefit to the bankrupt.

BOOK III.  
CHAP. III.  
SECT. II.

A creditor, having several demands, entirely distinct in their nature and origin, as where one is for a debt on bond on which he has the bankrupt in execution, and the other a demand for rent<sup>l</sup>; or in distinct rights, as where one is in right of his wife, and the other in his own right<sup>m</sup>; will be allowed to prove one under the commission, while he proceeds at law upon the other: but he will not be permitted both to come in under the commission and to proceed at law at the same time, for one and the same debt<sup>n</sup>; though he has different securities for it<sup>o</sup>; or to split a demand for that purpose<sup>p</sup>.

He must make his *election*; and if he has proceeded at law, before applying to prove, he ought not to be admitted, but upon condition of relinquishing his proceedings at law<sup>q</sup>.

<sup>k</sup> Ibid. 83.

<sup>l</sup> Exp. Botterill, 1 Atk. 109.

<sup>m</sup> Exp. Matthews, 3 Atk. 816.

<sup>n</sup> 1 Atk. 219.

<sup>o</sup> Exp. Crinsoz, 1 Bro. 270.

<sup>p</sup> 3 Atk. 816. Exp. Crinsoz,

1 Bro.

<sup>q</sup> Exp. Williamson, 1 Atk. 83.

BOOK III.  
CHAP. III.  
Sect. III.

If he proves, and proceeds at law afterwards, the Ld. Chancellor, sitting in bankruptcy, cannot directly restrain him from pursuing his legal remedy, or make an order upon him to release the bankrupt from custody: at least not in the case of a common creditor, though he may in the case of the petitioning creditor, as the latter submits himself to all orders the court shall make<sup>r</sup>. But the court, upon the application of the bankrupt, will put a creditor to his *election*, and if he elects to abide by his remedy at law, will order him to be discharged as a creditor under the commission<sup>s</sup>.

It has long been settled, that it is no *determination* of a creditor's election to take under the commission, that he has been chosen an assignee, without proving any debt, for having proved no debt, he can only be considered as a creditor at large<sup>t</sup>; or that he has actually proved a debt<sup>u</sup>; or proved his debt and chosen himself assignee<sup>x</sup>; or even that he has proved his debt, been chosen assignee, and received dividends<sup>y</sup>: but in all such cases, he will still be allowed, upon waiving his proof, and refunding the dividends, to pursue his legal remedy against the person of the bankrupt.

And it is the same with respect to the *bail*, unless where the creditor has acquiesced in his remedy under the commission, so long, or in such a man-

<sup>r</sup> Exp. Callow, 3 Vez. J. 1.

<sup>s</sup> 1 Atk. 215—221.

<sup>t</sup> Exp. Ward. 1 Atk. 153.

<sup>u</sup> Exp. Lindsey, ib. 220.

<sup>x</sup> Exp. Dorvilliers, ib. 221.

<sup>y</sup> Exp. Capot, ib. 219.



ner, as to give the bail reason to believe, that he had abandoned his remedy at law. As where a creditor, having held the bankrupt to bail *before* the bankruptcy, afterwards proved his debt, and signed an agreement along with the rest of the creditors under the commission, to permit the bankrupt to keep his house still open for trade, and to make him an *annual* allowance; he was not allowed, upon the bankrupt's absconding afterwards, to desert the commission and come upon the bail by surprize; who, by this conduct of the creditor, might be induced to neglect the opportunity of surrendering the principal at a time when it was in their power<sup>2</sup>. But where the action is brought *after* the bankruptcy, there is then no surprize upon the bail; they cannot suppose but that the creditor means to proceed in the action, and he will be allowed to do so, as in other cases, upon refunding the dividends he has received<sup>3</sup>.

As to what shall be considered as a *conclusive* election to proceed at law, it is held, that though taking the body of a debtor in execution, is in law a satisfaction of the debt, so that the creditor cannot afterwards resort to the effects; yet if he has taken the bankrupt in execution, *before* the commission issued, that *that* is no election to abide by his remedy at law; being done at a time when there

BOOK III.  
CHAP. III.  
SECT. III.

<sup>2</sup> Aylett and Hartford, 2 Bl.  
1317.

<sup>3</sup> Exp. White, 4 Bro. 114.  
S. C. better reported, 2 Vez.  
J. 9.

BOOK III.  
CHAP. III.  
Sect. III.

was no opportunity of election; and such a creditor may still come in under the commission, upon condition of discharging the bankrupt out of execution<sup>b</sup>.

But if he take the bankrupt in execution, *after* the commission has issued, *that* is making a *conclusive* election, and in that case, he is not permitted to prove, though he would discharge the bankrupt from the execution<sup>c</sup> (52).

A creditor,

<sup>b</sup> Exp. Hicklin, Co. B. L. 128.  
<sup>3</sup> Bro. 216.

<sup>c</sup> Exp. Hicklin, Co. B. L. Exp.

Bisson, ——— Hewitt, ib. 130.  
Exp. Warder, 3 Bro. 191. Exp.  
Cator, ib. 216.

(52) In all the cases upon this subject, the creditor had either himself discharged the bankrupt, or he was discharged under the certificate *before* the application to prove under the commission. The *debt* therefore, and *remedy* both, whether against the *person* or the *effects*, were in the one case renounced, and in the other barred. It should seem therefore the creditor could not have been allowed to prove, though *election* had been out of the question: and that for the same reason, even a creditor who has taken the bankrupt in execution *before* the commission, ought not to be allowed to prove, *if* he has either discharged him, or the bankrupt has been discharged under the certificate, before the creditor applies to prove. This is very different from the common case, where the creditor's *waiving* his execution, is the very *condition* of his being admitted to prove.

It is perhaps not easy, completely to distinguish the case of a creditor's commencing a proceeding at law after the commission, from that of taking in execution. If the execution's being considered as a *satisfaction* of the *debt*, were the real principle of excluding him in the latter case, then he ought not to be admitted

A creditor, however, proceeding at law either in the first instance, or after proving his debt, may still, renouncing any benefit under the commission, have an order to be admitted or continued as a creditor under it, for the purpose of assenting to, or dissenting from the certificate; which is done to afford him an opportunity of preventing, as far as he can, the very remedy he has chosen, from being at once defeated by the rest of the creditors discharging the person of the bankrupt, without his concurrence or controul<sup>d</sup>.

This privilege, either to abide by the commission, or proceed at law, is confined to the *common* creditors only. With respect to the *petitioning* creditor, besides the objection common to him

<sup>d</sup> 1 Atk. 220, 21. 7 Vin. 34. pl. 19, 20.

mitted in any case of that kind; but it is acknowledged he may be admitted where he has the bankrupt in execution *before* the commission: for this it is said, is not making an *election*; but that it *is* making an *election* to do so *after* the commission. Then the ground of the distinction should seem to be, the circumstance of *election*; but the commencing a proceeding at law *after* the commission, is equally a case of *election*; and as there are then no *effects* to be taken, and the proceeding, therefore, can only be with a view to charge the *person*, it seems as *decided* an *election* as if he had actually taken the bankrupt in execution. The petitioning creditor is not allowed to proceed at law, because it is said, if he does the commission must be *superfeded*. This it should seem can only be from considering the proceeding at law as a proceeding to charge the *person*, by which the debt would be satisfied on which the commission was founded.

with



BOOK III.  
CHAP. III.  
SECT. III.

with other creditors, of the inconsistency of the double remedy<sup>e</sup>, there is in his case the additional one that if he should elect to proceed at law, the commission must be superseded (53); which would be an injury to the other creditors who had proved under it<sup>f</sup>. He is therefore considered as having determined his election by taking out the commission; and is not allowed afterwards to proceed at law<sup>g</sup>; though for a demand, which is alleged to be distinct from that on which he sued out the commission, for the affidavit on suing out the commission is general, and does not mention the particulars by which the bankrupt becomes indebted<sup>h</sup>.

With respect to the *time* at which a bankrupt is entitled to apply to the court, for an order to put a creditor to his election, it is impossible to lay down any precise rule, where so much must in each particular case depend partly upon the conduct of the bankrupt, and partly upon the circumstances of his estate. On the one hand, in order to give the creditor an opportunity of judging how far the estate is likely to be productive, it seems reasonable that he should not be put to his election before a dividend has been declared; and accordingly, the present practice<sup>i</sup> requires either that a

<sup>e</sup> Exp. Wils. 1 Atk. 152.

<sup>h</sup> Exp. Ward, 1 Atk. 153.

<sup>f</sup> Exp. Lewes, ib. 154.

<sup>i</sup> Co. B. L. 132.

<sup>g</sup> Ibid. and see Exp. Callow,

<sup>3</sup> Vez. J. 1.

(53) Qu. of this.

dividend

dividend should have been declared, or at least that the assignees should have funds sufficient to make one. On the other hand, as it would be hard to postpone the relief of the bankrupt, in cases where the dividend is not delayed by his fault, it has accordingly been not at all unusual to make the creditor elect before any dividend declared<sup>k</sup>; and even before the time that under the statute any dividend *could* regularly be made<sup>l</sup>.

BOOK III.  
CHAP. III.  
SECT. III.

But when a creditor is thus put to his election before a dividend, and where a sufficient time is elapsed for making one, it seems to be thought necessary that the bankrupt should be able to explain his conduct, and to shew that the delay has not been imputable to him<sup>m</sup>; and in a case of this kind<sup>n</sup>, the court refused the application till the bankrupt should fully answer a bill filed against him by the creditor for a discovery (54).

#### 6. *Creditor having benefit of another's proof.*

A surety, having no absolute counter-security, cannot come in as a creditor directly in his own right, if he has not paid till after the bankruptcy

<sup>k</sup> Exp. Caw, —Rogers, —Horsley, —Koops, Co. B. L. 131, 2.  
Exp. Hopkinson, 1 Vez. J. 159.

<sup>l</sup> Exp. Dupaz, Co. B. L. 131.

within three months. Exp. James, ibid. 132. within two.

<sup>m</sup> Exp. Robertson, ibid. 130.

<sup>n</sup> Exp. Sidebotham, ib. 132.

(54) For case of landlord proceeding at law. See Sect. II. title *Rent*.

BOOK III.  
CHAP. III.  
Sect. III.

of the principal; yet if the creditor has proved the debt before he called upon the surety, the court will direct that he shall stand as a trustee for the surety, and will allow the latter (or in case he too is become a bankrupt, and his estate has paid dividends on account of the principal, will allow his assignees) to have the benefit of the principal creditor's proof, and to receive dividends upon it; but so as that no more shall be paid than twenty shillings in the pound upon the whole debt<sup>o</sup>.

And a court of equity upon a bill filed for the purpose, and on the surety's bringing the money into court, has ordered the creditor to go before the commissioners and prove his debt, for the benefit of the surety<sup>p</sup>; and stayed his proceeding at law against the surety, till he had done so<sup>q</sup> (55).

But the creditor cannot be thus turned into a trustee for the surety, to the prejudice of any right the former may have against the principal debtor's

<sup>o</sup> Exp. Ryfwicke, 2 P. W. 89.  
Exp. Marshall, 1 Atk. 129. Exp.  
Atkinson and others, Co. B. L.  
210.

<sup>p</sup> Beardmore and Cruttenden,  
Co. B. L. 211.

<sup>q</sup> Philips and Smith, *ibid*.

(55) Is this to be considered as established, that sureties having merely conditional securities, and not paying till after the bankruptcy, may come in place of the creditor, and receive dividends? Are they to be so favoured beyond all other creditors, and without relief to the bankrupt? For such sureties may still, after receiving under the commission, recover the residue of their debt against the bankrupt afterwards, they not being barred by his certificate.

estate,



estate, on a further and distinct demand; and in that case, the surety will only be allowed such part of the dividend as will remain, after allowing out of it, to the principal creditor, as much as will make up the proportion which he would have received, upon the residue of the debt proved beyond the debt to the surety, if this debt had been expunged<sup>r</sup> (56).

If a banker, having money of the bankrupt's in his hands, pay it *after notice* of the act of bankruptcy, though to creditors whose debts were antecedent, and who would have been entitled to prove under the commission; he will not be permitted

<sup>r</sup> Exp. Turner, 3 Vez. J. 243.

(56) This may, perhaps, to some readers, require a little explanation. For that purpose, it is only necessary to observe that the dividend upon a bankrupt estate is diminished, in proportion as the total amount of debts on which it is calculated is increased. If the creditor were confined to the dividend upon his further debt, calculated on a total amount *including* the surety debt, he would plainly receive less, than if calculated on a total in which this debt should *not* be included; and the surety would gain, what the creditor lost. It is exactly this difference, that is directed to be made up to him out of the dividend which would otherwise be coming to the surety. The surety being equally liable with the bankrupt himself, ought certainly to derive no advantage from the principal creditor's proving the debt against the latter, without first making up to him the loss which he would otherwise sustain by having made that very proof without which the surety could have had no dividend at all.

to

BOOK III.  
CHAP. III.  
Sect. III.

---

to stand in the place of the creditors so paid, and to receive dividends thereon with the other creditors \*.

### 7. *Reduction of proofs.*

It sometimes happens, *after* a creditor has made his proof, that either from a disclosure of facts, not before known or understood, it appears it ought not to have been admitted; or at least not to the extent; or that, from a change of circumstances, the state of the debt proved is materially altered: and in such cases, it becomes necessary either to expunge it altogether, or to make some reduction of the proof.

Thus if any bills proved, and excepted as securities, by a creditor who discounted them to the bankrupt, or took them as a security for a general balance (57), are afterwards paid in full or in any

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\* Hankey and Vernon, 3 Bro. 313.

(57) I have stated this rule, upon the authority of cases cited by Mr. Cooke, who adds also the case of bills taken as a security for a debt exceeding their amount. It seems to me, if the relative amounts of the security and debt were material, that it ought rather to be where the debt is less than their amount; and I observe the case stated (exp. Wallace) corresponds in fact with the position thus altered, the amount of the *securities* exceeding the *debt*. I am not aware of any objection to its being a *general* rule, that if any creditor is fully paid or satisfied, any of the securities *on which* he has proved, that the amount of the securities ought to be deducted from the proof.

way

way fully satisfied, the amount of such bills must be deducted from the proof, and the future dividends paid only on the residue of the debt \*.

BOOK III.  
CHAP. III.  
Sect. III.

So if the holder of a bill compound with the prior names upon it, *without* the *previous* assent of the assignees of the subsequent parties, the latter are discharged; and if he takes such composition *after* having proved under the commission against the latter, the amount of the bill must be deducted from the proof†.

8. *Claims.*

As a creditor who has a just demand upon the bankrupt estate, may be unable to attend for the purpose of swearing to his debt before a dividend is declared; or though he does attend, yet may be unable to ascertain the exact amount of his debt, as where it arises upon the balance of accounts which have never been liquidated<sup>u</sup>; or though the amount is sufficiently ascertained, and he is ready to swear to it, yet the commissioners entertain a reasonable doubt whether he ought in point of law to be admitted to prove, or think the circumstances of the debt require a further investigation: in these and other similar cases easy to be imagined, as it might be a great injustice absolutely to exclude such a creditor, when possibly he may afterwards be enabled completely to establish his

\* Exp. Smith, Exp. Bloxham, and Exp. Wallace, Co. B. L. 155, 156.

† Exp. Smith, 3 Bro. 1. Exp. Smith and others, Co. B. L. 170.

<sup>u</sup> 3 Will. 271.



BOOK III.  
CHAP. III.  
Sect. III.

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debt, they ought and do commonly allow him to enter a *claim*, by which he has the advantage of a dividend being reserved upon his claim in the mean time, and of being entitled, as soon as his debt is ascertained, and his proof admitted, actually to receive such dividend equal with the rest of the creditors, without the trouble and expence of an application for that purpose to the court of Chancery.

Claims, however, ought not to be admitted on light grounds, or where the creditor has not been sufficiently diligent in using what means were in his power for ascertaining or establishing his debt: as it is attended with the manifest inconvenience to the other creditors of locking up a fund unnecessarily, which would otherwise be immediately divided amongst them.

## CHAP. IV.

*Of the appointment and choice of Assignees, and manner of making the Assignment.*

UNDER the statute of Eliz. the commissioners had a direct and general power of acting themselves, in the collection and recovery of the effects, and in the distribution of them in specific portions amongst the *several* creditors; but that statute does not seem to have been framed with the view of enabling them to transfer this power to other persons, as *general* trustees for the benefit of all; and it was not probably till after the statute of the 1st of Ja. had expressly enabled them to assign, for the use of creditors, all *debts* due to the bankrupt, with the power to sue and recover in the assignees own names, that it became usual in practice to make assignments of the *whole estate*, in trust for *all* the creditors. The choice, however, of the persons proper to be appointed to this trust, seems to have been left in the discretion of the commissioners; till the 5th of Anne directed another course of proceeding which has since been followed in all the succeeding statutes.

BOOK III.  
CHAP. IV.

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*Of Temporary assignees Appointed by the Commissioners.*


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5 Geo. 2. ~~c. 30.~~ s. 30.

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As often as the commissioners think it necessary or proper for better preserving and securing the bankrupt's estate, they may *immediately* appoint one or more assignees, either of the *whole* estate or of any *part* of it<sup>a</sup>; but such temporary (or as he is usually called, *provisional*) assignee may be afterwards removed or displaced by the creditors, if they think fit, at the meeting for the *chusing* of assignees, and must deliver up and assign to the assignees then chosen, all that has come to his hands, or that has been assigned to him by the commissioners; under a considerable penalty in case of neglect or refusal.

As, in the short time that usually elapses between the opening of the commission and the chusing of assignees by the creditors, it is seldom necessary any thing should be done in the way of active management, as in suing debtors, or selling the effects (though the words of the statute seem to give sufficient authority to assign for such purposes); tem-

<sup>a</sup> 1 Atk. 96.



porary assignments are now seldom made but to prevent the effect of an *extent* at the suit of the *crown*; such an extent binding the property, if issued before an *actual assignment* made by the commissioners<sup>b</sup>. A provisional assignment in that view, is unnecessary with respect to *copyhold*, this not being liable to an extent<sup>c</sup>.

BOOK III.  
CHAP. IV.  
Sect. II.

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## SECT. II.

*Of assignees Chosen by the Creditors.*

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5 Geo. 2. c. 30. s. 26, 27, 31—38.

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Immediately after declaring a person a bankrupt, the commissioners are to appoint a time and place for the creditors to meet in order to chuse assignees; and are directed to assign the bankrupt's estate and effects to such persons as shall be chosen by the major part in *value*, according to the several debts then proved, of such creditors whose debts respectively amount to the sum of *ten pounds* or upwards; no creditor being permitted to vote in the choice, whose debt does not amount to that sum. But the statute prescribes nothing as to the object of their choice, which is left wholly in the discretion of the creditors.

<sup>b</sup> See below, Chap. V. Sect. II.      <sup>c</sup> 1 Atk. 96.

The powers, duties, and responsibility of assignees, depend partly upon positive statute, partly upon their general character of trustees.

*Under the statute*, their powers and duties are principally those of collecting and getting in all the bankrupt's property ; instituting suits for that purpose, when necessary ; reducing the whole into ready money, and making distribution as early as possible within the times prescribed ; keeping distinct books of account of all sums of money, or other effects received, which may be inspected, at all seasonable times, by any creditor who has proved a debt ; and producing and verifying their accounts before the commissioners, when required, upon oath.

The statutes do not require that the assignees should have the authority of the creditors to *commence suits at law* ; but they expressly require that no suit in *equity* shall be commenced, without the consent of a majority in value of the creditors, present at a meeting advertised for that purpose in the London gazette ; and they are directed to proceed in the same manner with respect to the *submitting of differences* or disputes between them and other persons to *arbitration* (58), and the *making of compositions* with debtors to the estate:

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(58) The arbitrators are to be chosen by the assignees and majority of creditors.

at which meetings, if some creditors do not attend, it is their own fault; and the majority present have a right to bind the whole<sup>d</sup>. Creditors are not warranted by the act of parliament to give assignees a *general* authority for bringing suits, or submitting differences at their discretion, but each particular case must be specifically considered and authorized<sup>e</sup>. Besides the occasions on which it is particularly required by the statute, it is also very proper in the assignees to advertize a meeting upon any other extraordinary occasion that concerns the creditors<sup>f</sup>.

In their *general character of trustees*, they are not responsible for losses happening by necessary acts; but this does not extend to persons employed by them, but only to the trustees, the assignees themselves. If without necessity, they employ an agent who deceives them, they are liable to make good the loss, to their *cestuique* trusts, the creditors; as where they employ the clerk of the commission (being a person of little credit), to pay dividends, who misapplies and embezzles the money<sup>g</sup>. But if in appointing an agent, they act conformably to the common usage and method of business, as in employing a broker to sell the effects for them by auction, they will not be answerable though he receives the money, and soon after becomes insolvent<sup>h</sup>: and they may, at all

<sup>d</sup> Cooper and Pepys, 1 Atk. 106.

<sup>g</sup> *In re* E. of Litchfield, 1 Atk. 87.

<sup>e</sup> Exp. Whitchurch, ib. 91.

<sup>h</sup> Exp. Belchier, Ambl. 218.

<sup>f</sup> 1 Atk. 253.



BOOK III.  
CHAP. IV.  
Sect. II.

times in doubtful cases of this kind, make themselves secure, by taking the directions of the creditors themselves<sup>1</sup>.

One assignee is not answerable for the neglect of another, if he is not privy to the transaction in question<sup>2</sup>. They are each separately liable only for what they receive; and for their further security, the covenant they enter into for performance of the trust, in the assignment under the commission, is always now made in the disjunctive<sup>3</sup>.

Being considered as trustees, and not like executors who have each a power over the whole estate, Ld. Hardwicke doubted<sup>m</sup> whether payment of a debt to one assignee and taking his receipt, would be a discharge to a debtor; but it has been lately held by a great authority, that a *bonâ fide* payment to one will be good<sup>n</sup>; but not where the other expressly dissents, for this would put it in the power of any one assignee, by compounding debts or otherwise, to dissipate and ruin the estate<sup>o</sup>.

Assignees, if they act improperly, are not only liable at law to the creditors for a breach of trust<sup>p</sup>, but they may also be *removed* on account of corruption or misbehaviour<sup>q</sup>, or for want of sufficient substance or credit<sup>r</sup>, as particularly in the case of becoming bankrupt<sup>s</sup>.

<sup>1</sup> Ibid.

<sup>2</sup> 1 Atk. 88.

<sup>3</sup> Ibid. 90.

<sup>m</sup> Cann and Read, 3 Atk. 695.

<sup>n</sup> Smith and Jamieson, Esp.

N.P. 114.

<sup>o</sup> Bristow and Eastman, *ibid.*

174.

<sup>p</sup> 1 Atk. 253.

<sup>q</sup> Ibid. 92. 7 Vin. 76. pl. 3.

<sup>r</sup> 1 Atk. 92.

<sup>s</sup> Exp. Newton, *ibid.* 97.

It is not a sufficient ground for *removing* assignees chosen at the usual time, that some of the principal creditors living remote from London, or being beyond sea, could not send letters of attorney in time to vote in the choice<sup>t</sup>; nor even for *postponing* the choice for a length of time, when it may be expedient immediately to take care of the bankrupt's estate and effects<sup>u</sup> (59).

BOOK III.  
CHAP. IV.  
Sect. II.

Whenever it is necessary to have new assignees, the lord chancellor is empowered by the statute, upon petition of any creditors, to make such order therein as he thinks proper (60).

If an assignee dies before accounting for what he has received, and leaving no personal assets, the commissioners may come upon his real estate, as specialty creditors; for the counterpart of the assignment executed to them by the assignees, being under hand and seal, makes it in the nature of a specialty debt<sup>x</sup> (61).

<sup>t</sup> Exp. Gregnier, *ibid.* 91.

<sup>x</sup> Primrose and Bromley, 1

<sup>u</sup> *Ibid.*

Atk. 89.

(59) The time appointed for the choice of assignees, in town commissions, is usually a fortnight from the advertisement of the commission in the gazette.

(60) By general order of Ld. Loughborough, in the cases of death or bankruptcy of assignees, the commissioners are authorized, upon application to *them* by one or more of the creditors entitled to vote in the choosing of assignees, to appoint a meeting for proceeding to a new choice.

(61) See further upon this subject of the powers and duties of assignees, under the subsequent titles of *Proceedings at law*, *Dividends*, &c.

## SECT. III.

*Of the Form of the assignment, generally; and circumstances subsidiary to carrying it into effect in particular cases.*

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13 Eliz. c. 7. s. 2, 11.

21 Ja. c. 19. s. 12.

5 Geo. 2. c. 30. s. 31, 42.

36 Geo. 3. c. 90.

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None of the statutes prescribes any specific mode of conveyance; but as those of Eliz. and Ja. direct it to be by deed indented and *inrolled*, the conveyance of real estate is usually made by bargain and sale, as the least expensive.

In the former statute no *time* is limited for *inrolling* the deed; but no estate passes to the bargainee, and he can make no grant over, or demise, till inrolment; for this is different from the case of a bargain and sale enrolled pursuant to the statute of enrollments of the 27 H. 8. c. 16. That does not direct that no estate shall pass *until*, but only *unless* the deed is enrolled. There, the contract is with the party that has the *estate*, and the estate passes by the contract, upon which the use is executed by the statute of uses. But commissioners of bankrupt, have only



only a *power*, and no *estate*, and to pass the *estate*, the deed must be enrolled<sup>r</sup>.

BOOK III.  
CHAP. IV.  
SECT. I. I.

The conveyance of *estates tail*, by the statute of Ja. must be enrolled within *six months*.

The *personal* estate is assigned by deed which needs no inrollment; the words of the act, that require inrollment, not extending to it<sup>z</sup>.

*Copyhold*, like other real estate, may be assigned by bargain and sale; but the statute restrains the vendee from entering and taking the profits, till he has compounded with the lord for his fine; and who upon such composition, shall, at the next court, admit him tenant. Though the bargainee cannot enter and take the profits before admittance, this is only for the lord's benefit; but the *estate* is out of the copyholder immediately by the bargain and sale, and vests in the bargainee when admitted, by relation from the bargain and sale, so as to avoid any intermediate claims<sup>a</sup>. The general assignees, if the commissioners convey to them in the first instance, are considered<sup>b</sup> as vendees within the statute, and must pay the fine to the lord, and be admitted before they can enter and take the profits; and when they have sold, must surrender to the purchaser, upon whose admittance a new fine must be paid. To save this expence, the commissioners may convey to a purchaser in

<sup>r</sup> Perry and Bowes, Vent. 360. 2 Jo. 197. 2 Show. 156. Elliot and Danbey, 12 Mod. 3. <sup>z</sup> 2 Co. 26. 1 Vent. 360.

<sup>a</sup> Parker and Blacke, Cro. Car. 568.

<sup>b</sup> Drury and Mann, 1 Atk. 95.

BOOK III.  
CHAP. IV.  
Sect. III.

the first instance. If the vendee of the commissioners tender a reasonable fine, and the lord refuse it, the vendee, it is said <sup>c</sup>, may enter.

In the case of a saleable *office*, the course seems to be, for the assignees to agree with a purchaser, and after he has been proposed to, and approved of by the persons having the power of admission, then for the bankrupt to surrender to them in order that the purchaser may be admitted <sup>d</sup>.

With respect to *stock* to which the bankrupt may be intitled in the public funds; as no other method of transfer was available in law, but such as was *signed* by the *parties* making them or their attorney; it has been enacted by the 36 Geo. 3. c. 90. for relief of persons equitably and beneficially interested in the stocks, that if a bankrupt refuse to transfer stock standing in his name in his own right, the lord chancellor may, on petition of the assignees, order it to be transferred to, and into their names, and the dividends to be paid over as the chancellor shall direct.

The *general* words commonly used in the bargain and sale, whereby the commissioners grant, &c. "all the estate, right, title, interest, property, profit, benefit, and equity of redemption, claim and demand whatsoever, &c. in or to the same premises, &c." are sufficient to pass a right of bringing a *real action*, as well as *every* kind of pro-

<sup>c</sup> Stone 127.

Exp. Joynes, Co. B. L. 287.

<sup>d</sup> Exp. Butler, 1 Atk. 214.

perty,

perty, though not *specifically* described<sup>e</sup>. The deed is not a particular conveyance of particular lands only, but a general conveyance of *all* the real (as the assignment is of all the personal), property of the bankrupt. The commissioners being strangers to it, cannot describe every particular species of it, and it would be infinitely mischievous if it were to be held that *every thing* did not pass under the general words that are used.

BOOK III.  
CHAP. IV.  
SECT. III.

For *real* estate coming to the bankrupt *after* the assignment, and before his certificate, there must be a *new* conveyance<sup>f</sup>; but a subsequent assignment is not necessary for future *personal* estate; every thing, it is said<sup>g</sup>, passing by the first, and every new acquisition vesting in the assignees (61).

When an assignee is removed, he is directed to join with the remaining one, in the assignment to the latter, and the new assignee; and when an assignee is removed on becoming bankrupt, he together with his own assignees, are directed in like manner to join in the new assignment<sup>h</sup>.

Even after assignments, in trust for all the creditors, came into use, they appear<sup>i</sup> to have been specific as to the subject of the assignment, and confined to such effects as were set forth in a sche-

<sup>e</sup> Smith and Coffin, 2 H. Bl.

<sup>f</sup> 1 Atk. 253.

<sup>g</sup> Ibid.

<sup>h</sup> Exp. Newton, *ibid.* 97. and see Ld. Loughborough's order.

<sup>i</sup> Good. 232. 245.



BOOK III.  
CHAP. IV.  
Sect. III.

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dule which was annexed to the deed. They are now conceived in the most comprehensive terms possible, including every thing that the bankrupt was entitled to at the time he became bankrupt, or at any time since; and the *schedule* is by the 5 Geo. 2. (to save expence), directed to be omitted in future.

CHAP. V.

*Of the Effect of the assignment.*

SECT. I.

*Considered in respect of the different Kinds of property that may be assigned, and of the Nature and Extent of the Interest that vests in the assignees.*

I. *Of the different Kinds of property that may be assigned.*

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34 & 35 H. 8. c. 4. f. 1.

13 Eliz. c. 7. f. 2. 11.

1 Ja. c. 15. f. 5. 13.

21 Ja. c. 19. f. 12, 13.

5 Geo. 2. f. 1.

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**T**HE object of the statutes here referred to, undoubtedly is to place at the disposal of the commissioners, for the benefit of the creditors, every sort of property, real or personal, that the bankrupt himself is entitled to, of a *valuable* nature, and *capable* of being applied towards the *payment* and *satisfaction* of *debts*\*. So that, although the

BOOK III.  
CHAP. V.  
Sect. I.

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\* 1 P. W. 252. 257. 10 Mod. 245.

recital

BOOK III.  
CHAP. V.  
Sect. I.

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recital contained in them, embraces such a number of particulars, as might seem to lead to a great diversity of topics; it is at the same time so comprehensive, and manifests so plainly the general object and intention of the legislature, as leaves little room for question, and makes it easy to bring the whole subject within a very moderate and even narrow compass. To enumerate specifically all the different subjects of property, and interests in it, that are particularized in the books, as capable of being assigned, but upon which no question has been made, would only be to repeat the statutes themselves in which almost every possible kind of legal property or equitable interest, whether in possession or expectancy, is included, either by express words or by necessary implication. This title, therefore, shall be confined to such cases only, as, having given rise to discussion, have afforded occasion of laying down the general principle of construction of these statutes, or which afford some ground of exception or limitation of its extent: and these relate principally to things in *action*, contingent interests or *possibilities*, things in their nature *not saleable*, property under *restraints of alienation*, property in *joint tenancy*, property of the *wife*, property in *trust*, and lastly, to property situate in *other countries*.

*Things*



*Things in action.*BOOK III.  
CHAP. V.  
Sect. I.

Of *debts*, which every where constitute so large a part of a trader's effects, and which therefore could not fail to be one of the principal subjects of property in the view of the legislature, the assignment is provided for, by an express and very special clause in the statutes.

But there are some other things in action, not so specifically and distinctly mentioned, which appear, by some old determinations, to have been formerly considered as not capable of being assigned. Accordingly, where a father, having upon the marriage of his son, settled lands upon himself for life, with remainder for life to the son, covenanted during his life to pay his son an annuity, and the son became bankrupt, it was held <sup>1</sup>, upon a bill filed by the assignee, to have the agreement performed, and to compel payment of the annuity, that an assignee was not entitled to have the performance of an *agreement* made with the bankrupt : and the court is said to have relied upon a former determination <sup>m</sup>, where it was said to have been in like manner held, that the assignees of a bankrupt lessee were not entitled to the benefit of a *covenant* for the renewal of a lease.

No reason, however, for the determination appears in the report of either of the cases, and the case said to have been relied upon is expressly contradicted by

<sup>1</sup> Moises and Little, 2 Vern.<sup>m</sup> Drake and M. of Exeter,<sup>1</sup> Cha. ca. 71.

another

BOOK III.  
CHAP. V.  
Sect. I.

another report of it<sup>n</sup>; and has very recently been considered as contrary to the plain intention of the statutes<sup>o</sup>, which meant to pass to the assignees *all rights of action*, real as well as personal, along with every species of right, of which by any possibility, *profit* could be made. For though rights of action are not assignable at common law, and the statutes use the expression “such right, &c. as the bankrupt may lawfully depart withal;” yet the policy of the bankrupt law requires that they should be transferred, as much as any other species of property: and it appearing upon all the statutes taken together, that the plain intention of the legislature was, that every beneficial interest the bankrupt had, should be disposed of for the benefit of his creditors; this construction is not to be confined by the expression alluded to in particular statutes, any more than, because the words bargain and sale are used in the statute of H. 8., though omitted in that of Eliz, that therefore nothing should pass but what the bankrupt could convey by bargain and sale (62).

<sup>n</sup> 2 Freem. 183.

<sup>o</sup> Smith and Coffin, 2 H. Bl. 444.

(62) That choses in action are within the description of *goods and chattels*; and that this description, under the bankrupt laws, takes in all kind of personal property of the bankrupt, whether in possession or action; and that though things in action would not pass under such description in a common grant or assignment, or bargain and sale, yet that in an act of parliament which can pass any thing, they are always included; see Ryall and Rolle, 1 Vez. 371.

At the same time it is easy to imagine, that in cases of beneficial agreements with the bankrupt, there may be many modifications of this general right of the assignees, or at least of the relief to which they may be entitled; as where a contract has been entered into upon considerations *personal* to the bankrupt individually; or where at the time of the bankruptcy, the consideration is *executory* and depending upon matters of *future* performance<sup>p</sup>.

A *right of action* for money lost by the bankrupt *at play*, passes to his assignees<sup>q</sup>. The debt does not attach by the commencement of an action for it, but attaches in the loser the moment the loss is paid; and the money lost and paid is part of his property, which has wrongfully passed to the winner, and for which, therefore, the assignees of the former, have a right to sue.

But a *right of action* for *slander*, is not assignable; on account, as it is said<sup>r</sup>, of its uncertainty: but another reason may be added, namely, that it does not arise out of a subject of *property*, but is only a right to a satisfaction for a mere *personal* injury, which in its own nature cannot pass to a representative (63).

<sup>p</sup> See Brooke and Hewitt,

308. 2 Vez. J. 544.

Vez. J. 253.

<sup>r</sup> Benson and Flower, W. Jo.

<sup>q</sup> Pate and Brandon, 2 H. Bl.

215.

(63) In the case cited, it is said that if judgement is before the bankruptcy, it may be assigned, because it is then reduced to a certainty. But then also it becomes a positive pecuniary debt.



*Contingent interests, or Possibilities.*

It was at one time held generally, that a *possibility* was not assignable by commissioners<sup>s</sup>, but this has been since over-ruled<sup>t</sup>; and, where a devise was to such of the children of the devisor's daughter as should be living at her death, and she had issue a son who became bankrupt, and obtained his certificate, after which the mother died, it was held to be perfectly clear that this contingent interest passed to the assignees; not only because commissioners are empowered to assign every thing the bankrupt may lawfully depart withall, and the bankrupt might have released this in the mother's life-time, for a release or assignment of a possibility will be supported in equity; but because *possibilities* are expressly mentioned in the latter statutes (63), and the 21 of Ja. directs that the statutes shall be largely and beneficially construed for the relief of creditors; and also because the statutes for discharging bankrupts on certificates never intended to entitle the bankrupt to any estate by virtue of any *claim* subsisting *anterior* to the bankruptcy.

But where an estate came to a bankrupt *by descent as heir at law*, after he had obtained his cer-

<sup>s</sup> Jacobson and Williams, 1 P. W. 132. 2 Atk. 420. and see P. W. 382. Robinson and Taylor, 2 Bro.  
<sup>t</sup> Higden and Williamson, 3 589.

(63) The *only* statute which mentions a possibility, as an interest in the bankrupt, is the 5 G. 2. c. 30. s. 1. which requires him to *discover* every thing whereby he or any of his family hath or may have or expect any profit, possibility of profit, &c.

tificate; it was held<sup>a</sup> that this was not such a possibility as should go to the assignees; that there must be a *persona designata*; and that the possibility must be such as might be assigned or released, and could be disclosed upon the bankrupt's last examination under the 5 Geo. 2.

BOOK III.  
CHAP. V.  
Sect. I.

A possibility *coupled with an interest*, which may be the subject of release or assignment, is clearly distinguishable from a *bare possibility*, such as the *hope of succession* in an heir to the ancestor, which is not a subject of disposition; for if the heir were to dispose of this in the life-time of the ancestor, and the inheritance should afterwards devolve upon him, such a disposition would be void<sup>x</sup>.

*Things not Saleable.*

The commissioners may dispose of an *advowson*, but cannot sell the *void turn* of a church; and if at the time of the sale of the advowson, the church is void, the bankrupt himself, and not the vendee under the commission, shall present<sup>y</sup>.

Nor an *office that concerns the administration of justice*, within the 5 and 6 Edw. 6.; as the office of a *serjeant at mace in the city of London*<sup>z</sup>, whose duty is to execute writs and processes directed to the sheriff.

Or that of a *sworn clerk of the six clerks office*<sup>3</sup>.

But the office of *under marshall of the city of London* may be sold<sup>b</sup>, it not being within the

<sup>a</sup> Moth and Frome, Amb. 394.

<sup>z</sup> Lowfield's ca. 1 Atk. 212.

<sup>x</sup> Jones and Roe, 3 T. R. 88.

<sup>3</sup> Britton's ca. ibid.

<sup>y</sup> Good. 116. Burn. Eccl. Law.

<sup>b</sup> Exp. Butler, ib. 210. Amb. 73.

BOOK III.  
CHAP. V.  
Sect. I.

5 and 6 Edw. 6. but concerning only the *police* of the city, and there being several instances of acts of common council for the sale of it.

One of the *gentlemen pensioners* having become bankrupt, the court directed his place to be sold<sup>c</sup>.

But the *place* of a *Jew broker*, which is a description of persons who consist of a limited number, and are merely *licensed* by the court of aldermen, is not saleable<sup>d</sup>: this being no *office* at all; which is very different from the case of the *under marshall*, which is a known office, and usually sold by the city upon a vacancy.

With respect to the *half-pay* of an officer in the army, it has been decided<sup>e</sup> (64) that he is not bound to discover or surrender it upon his last examination; and though the case here cited is the only one that appears to have occurred in bankruptcy, the authority is completely established by some recent determinations, in which it has been held that an officer cannot himself assign either his *full*<sup>f</sup>, or his *half-pay*<sup>g</sup>; and this, upon the principles of public policy (65).

In

<sup>c</sup> Exp. Joynes, Co. B. L. 287.

<sup>d</sup> Exp. Lyons, Amb. 89.

<sup>e</sup> Cathcart and Blackwood, in the Ho. of Lords, 1765.

<sup>f</sup> Barwick and Read, 1 H. Bl. 627.

<sup>g</sup> Flarty and Odum, 3 T. R.

681. Lidderdale and D. Montrose, 4 T. R. 248. Stone and Lidderdale, 2 Anstr. 533.

(64) In this case, the bankrupt was on the establishment of half-pay, having held a commission under government, as *director of an hospital* on a military expedition.

(65) Another ground of objection thrown out, was the *uncertainty* and *contingency* of the *fund*. The objection, however,



In one of the cases cited, however<sup>h</sup>, Mr. Justice Buller seemed to think that an officer might assign the *arrears* of his pay actually due; yet the principle of public policy might be considered as applying equally to this case; and in Cathcart and Blackwood, it was principally, if not only the *arrears*, that seem to have been in question.

BOOK III.  
CHAP. V.  
Sect. I.

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*Property under Restraints of Alienation.*

The *assignment* by commissioners, of a *lease* in which was a *proviso* that the *lessee*, his *executors* or *administrators*, should not *assign without consent* of the lessor, with a power to the lessor of re-entry, and that the lease in such case should be void, was held<sup>i</sup> to be no breach of the proviso; because done by the authority of a *statute*, which supercedes any private agreement between the parties inconsistent with it; and such a proviso ought not to be allowed to defeat the statutes made in favour of creditors, and to deprive them of the advantage of a beneficial lease.

<sup>h</sup> Flarty and Odum.

<sup>i</sup> Goring and Warner, 7 Vin.  
85.

ever, from considerations of public policy, seems the most satisfactory. In Schelinger and Blackerby, (1 Vez. 347.) in which Ld. Hardwicke held, that the office of taking care of the palace and house of lords, was liable to creditors; he held a fee, paid by warrant from the crown, to be a part of it, though only a *voluntary allowance of the crown, and might be varied.*

BOOK III.  
CHAP. V.  
Sect. I.

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*Provisoes* of this kind have always been narrowly looked into by the courts<sup>k</sup>, and are generally considered as a restraint only against an assignment by the *act of the party*, and not against, as in cases of bankruptcy, an assignment *in law*<sup>l</sup>.

But it has been determined that a lease of a farm for 21 years with a *proviso* that the landlord might re-enter, if the lessee, his executors or administrators, should commit any act of bankruptcy *whereon a commission should issue, and he should be found a bankrupt*, could not be assigned<sup>m</sup>; this being, it was said, merely a stipulation against the act of the lessee himself, which it was competent for the lessor to make; and which was neither unreasonable between landlord and tenant; nor against any express law or decided case; nor contrary to public policy in respect of such a possession enabling a tenant to hold out false colours to the world, which is an objection that does not apply to the case of land, in which creditors need not rely on the bare possession, but may resort to the title itself by which it is held.

And an annuity given by will for life, under a strict direction to pay it into the annuitant's *own hands only*, and upon *his own receipt*, and that if the same should be *alienated*, it should immediately thereupon *cease and determine*, was held<sup>n</sup> to have ceased and determined by the bankruptcy of the

<sup>k</sup> Cruoe and Bugby, 3 Will.

237.

<sup>l</sup> Philpot and Hoare, Ambl.

480.

<sup>m</sup> Roe and Galliers, 2 T. R.

133.

<sup>n</sup> Dommet and Bedford, 6 T.

R. 684. 3 Vez. J. 149.

annuitant.

annuitant, and the bargain and sale to the assignees under the commission (66).

BOOK III.  
CHAP. V.  
Sect. I.

*Property in Joint tenancy.*

There is no doubt, generally, that a bankrupt's moiety of an estate in *joint-tenancy* may be sold; and there seems to be as little, as to a question that has been mooted<sup>o</sup>, namely, whether if a joint-tenant becomes bankrupt and *dies*, his part shall

<sup>o</sup> Billingham. 111. Good. 89.

(66) This was an interest which *accrued* to the bankrupt himself, only from *time to time*; and by the terms of the grant, could no more be paid after an assignment, than an annuity for life could after his death: the property ceasing to accrue after the bankruptcy in the one case, as after the death in the other. But the operation of the proviso in *Roe and Galliers* was to divest a property already vested and settled in another person; the landlord's right of re-entry being expressly stipulated to arise, not upon the act of bankruptcy merely, but upon an act of bankruptcy *whereon* a commission should issue, and the tenant should be found a bankrupt.

In the cases of marriage provisions, where a husband gives a bond for a sum of money payable immediately on committing an act of bankruptcy; as the debt, it is held, does not arise by, but after the bankruptcy, the obligee, therefore, is not allowed to claim against the bankrupt's estate. And this construction is adopted not only against a very favoured class of creditors, namely a wife and children; but in a case too where the contingency being the act of bankruptcy itself, some subtlety of distinction between the right accruing *after*, and not *by* or *upon* the bankruptcy, was required, in order to attain so unfavourable a construction. In the proviso in *Roe and Galliers*, there seems to be no room for any difficulty of that kind. But see *Lockyer and Savage*, Str. 947.



BOOK III.  
CHAP. V.  
Sect. I.

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be sold; which seems to have been properly solved in the affirmative, because the statutes pass every thing that the bankrupt could himself have disposed of at the time of his bankruptcy, and the 1 Ja. authorizes the commissioners to proceed in the same manner *after his death*, with respect to his lands and goods, &c. as they *might have done* under any of the statutes *during his life*.

*Property of the Wife and Trust property,*

Are for the most part so closely connected with the subject of the next head of this section, namely the *Nature and Extent of the Interest* that vests in assignees, that I think it better to bring the whole under one view by referring them to that place.

*Property Situate in Other countries.*

The assignment passes the bankrupt's personal estate, though out of the territory of England; whether in countries dependent on the crown of Great Britain, as Scotland, Ireland, or the colonies; or independent on it, as America<sup>p</sup>; and this, upon the general principle that personal estate has no locality, but is every where subject to the same law which governs the person of the owner; and the legislature is supposed to have had such property in contemplation, in using the

<sup>p</sup> See below, Sect. II. the cases, and Good. 114. Com. Dig. on the subject of *Attachments*; 519.

words "money, goods, &c. *wheresoever found or known.*"

BOOK III.  
CHAP. V.  
Sect. I.

With respect to real estate, it seems equally within the spirit of the law, and the general words of the statutes seem sufficiently large to comprehend it. But as to the manner in which assignees are to come at property of this kind, not only out of the reach of the jurisdiction of our courts, but subject to such positive institutions and local usages as every where govern both the enjoyment and transmission of it, I am not aware of any authority. The bankrupt seems clearly bound to *disclose* it upon his *examination*; and in a case<sup>a</sup> where a question arose upon the validity of a certificate, against which, it was alleged that the bankrupt had concealed, amongst other things, some *real* property in *Scotland*, the only point, it appears, which was thought could be made on the part of the bankrupt, was, that the concealment was, under the particular circumstances, not *fraudulent*, the bankrupt having no *beneficial* interest in the property in question.

## II. *Of the Nature and Extent of the Interest that vests in assignees.*

The uniform principle laid down by the courts upon this subject is, that assignees take a bankrupt's property in the same condition, and subject to the

<sup>a</sup> Cathcart and Blackwood, in the H. of Lords, 1765.

same

BOOK III.  
CHAP. V.  
Sect. I.

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same burthens, as the bankrupt himself had it; that they stand in his place, and are bound by all acts fairly done by him in relation to his property; and that this remains subject, in their hands, to all equitable liens, by which it was affected in the hands of the bankrupt himself. With respect to the application of this principle to particular cases, I shall consider it first with respect to property which the bankrupt has *originally in his own right*, and next with respect to that which he has in the *right of others*. Under the former, I shall consider it first *generally* in cases which are either too various, or too inconsiderable, to admit or to require further sub-division; next in cases of *set-off*, and lastly in certain cases of *lien*. Under that of property in the right of others, I shall consider the interest of the assignees, first in what the bankrupt takes as *husband*, next as *trustee generally*, thirdly as *executor or administrator*, and lastly as *factor*.

I. *With respect to property which the bankrupt has originally in his own right.*

1. *Generally.*

If a trader *purchase* land, and part of the *purchase money* is *unpaid* at the time of his bankruptcy, as there is a natural equity that the land should stand charged with so much as is unpaid, his *assignees* cannot compel the vendor to come in



in like other creditors, under the commission, but the *land* remains subject to the same lien in their hands<sup>r</sup>.

BOOK III.  
CHAP. V.  
Sect. I.

Or if he had articted to *sell*, the assignees standing in his place cannot compel the purchaser to pay the remainder of the purchase money, unless upon their conveying a title in the same manner as the bankrupt had articted to do<sup>s</sup>.

In the case of *conveyances made*, or *deeds deposited* to have a conveyance made afterwards, equity will, *against the assignees*, supply a *defect* in the conveyance, or give such *relief* according to the intention of the parties, as it would against the *bankrupt* himself. As in the case of the want of a presentment of a surrender of copyhold, after the time limited by the custom of the manor, and after the bankrupt's death<sup>t</sup>; or that of a lease deposited or pledged, for the purpose of an assignment to the party, either as a purchaser or a tenant<sup>u</sup> (67).

In one case at law it was held<sup>x</sup>, that the assignees of a bankrupt *tenant in tail*, who, after making a *mortgage for years*, became bankrupt, and died, *without suffering a recovery*, should hold the estate

<sup>r</sup> Chapman and Tanner, 1  
Vern. 267.

<sup>u</sup> Russell and Russell, 1 Bro.  
269.

<sup>s</sup> Orlebar and D. of Kent, 1  
P. W. 737.

<sup>x</sup> Beck and Welsh, 1 Will.  
276.

<sup>t</sup> Taylor and Wheeler, 2  
Vern. 564.

(67) See further, title *Husband*, below.

BOOK III.  
CHAP. V.  
Sect. I.

*free of the mortgage*; for that the statute of Ja., which empowers the commissioners to dispose of estates tail, was made for the benefit of the general creditors, and not of any particular one who relied upon the title he had accepted; that the mortgagee's title was at an end by the death of the tenant in tail; and that the statute never intended to put prior incumbrancers on an estate tail in a better case than they would have been if the statute had never been made.

This, however, appears to be contrary to what should otherwise seem to be the plain meaning of the statute, namely that by the bargain and sale under the statute, the *assignees* should take the *same* estate the *bankrupt* himself would have done, if he had suffered a recovery, but no more. And at least where there is a specific *covenant for further assurance*, it has since been repeatedly held<sup>y</sup>, that the estate is bound by it in the hands of the assignees, and they have been decreed to redeem the mortgagee.

If the bankrupt mortgage *several* estates for *several* sums, and *one* of them proves deficient, and the other more than sufficient, the mortgagee will be entitled against the assignees, if they would redeem one, to make them redeem both<sup>z</sup> (68).

A bank.

<sup>y</sup> Edwards and Applebee, 3 Bro. 652. Towle and Rand, ib. Pye and Daubuz, 3 Bro. 595.

<sup>z</sup> Pope and Onslow, 2 Vern. 286.

(68) That the assignees would in such a case be subject to the same equity as the mortgageor, seems without doubt; but as

A bankrupt being indebted to the crown as deputy post-master, and upon an extent being issued, having promised to pay also a debt to the crown due from his father who had been in the same office; an application by the assignees to have the extent discharged upon payment of the bankrupt's own debt, was refused, unless they paid both <sup>a</sup>.

Although a *chose in action* cannot strictly be assigned at law, yet if a bankrupt before his bankruptcy, for a valuable consideration and without fraud, assign to a creditor, a debt due to the bankrupt himself; such an assignment, whether of a simple contract debt, as by a draught upon a particular fund <sup>b</sup>, or of a debt by specialty, as by assignment of a bond <sup>c</sup>, will be supported *against* the assignees under the commission, either in a court of equity or of law. And even without a regular or complete assignment in point of form, as where it is without indorsement, in the cases of a bill of exchange, or of bills of lading and policies of insurance; yet if the respective instruments or writings, which are the documents of the right to the property, are delivered before the bankruptcy, the property being in a situation or of a kind not to admit of a specific

<sup>a</sup> King and Lacy, Bunb. 337.<sup>c</sup> Peters and Soam, 2 Vern.<sup>b</sup> Row and Dawson, 1 Vez.

428, Winch and Keeley, 1 T. R. 619.

331.

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to the rule itself as between mortgageor and mortgagee, see exp. King, 1 Atk. 300.

delivery,



BOOK III.  
CHAP. V.  
Sect. I.

---

delivery, as a ship at sea or a chose in action, the creditor will have an equitable lien upon it, which will be equally available against the assignees<sup>f</sup>.

Assignees cannot, any more than the bankrupt himself could, hold property obtained by his *fraud* or *crime*; and therefore have been held liable to restore money received by them upon bills which he had got in return for one, of which he knew the acceptance to be a forgery<sup>g</sup>.

And where a trader before his bankruptcy, having obtained a promissory note for goods sold, delivered it without indorsement to a creditor, and took a receipt for it; his assignees, who, after the death of the drawer of the note, applied to the executor, and received the money, were held<sup>h</sup> to be, as the bankrupt himself would have been under the same circumstances, trustees for the creditor, with respect to the money they had received, and were ordered to pay it over.

Assignees are barred by the *statute of limitations* from the *same time* the *bankrupt* himself would be, and not from the time only of the assignment<sup>i</sup>.

If the bankrupt has a lease; though the *term* passes by the assignment, the assignees will not be liable for *rent* accruing *after* the bankruptcy, if

<sup>f</sup> Brown and Heathcote, 1 Atk. 160. Lempriere and Pasley, 2 T. R. 485.

<sup>g</sup> Harrison and Walker, Peak's N. P. 111.

<sup>h</sup> Exp. Byas, 1 Atk. 124.

<sup>i</sup> Ashbrook and Manby, Comb. 70. Grey and Mendez, Str. 556. 8 Mod. 171. South S. Co. and Wymondsell, 3 P. W. 143.

they

they do not take *possession*<sup>k</sup>. Nor if they enter and possess, will they be personally liable in an action for *use and occupation*, for the bankrupt's occupation before the bankruptcy, without proving their special instance, and request for the bankrupt to occupy<sup>l</sup>. They having no relation to him but as his assignees, and this not commencing till the close of his occupation, such relation alone cannot have the effect of making them personally liable for *his* occupation before his bankruptcy. If the lessor can at all in this form of action recover against one for use and occupation by another, it must be upon the ground of that occupation having been permitted at his request, and that request must be proved.

Lastly, although assignees succeed to all the bankrupt's beneficial rights of property, and take it subject to all the same legal and equitable charges, yet it must be extremely obvious that representing creditors, they may in many cases take even a better right than the bankrupt himself, as against third persons; and may impeach transactions which the bankrupt could not have impeached<sup>m</sup>. Of this the reader will find in the former as well as in this section, and particularly in the next, almost constant examples.

<sup>k</sup> Bourdillon and Dalton, Esp. N. P. 237. Peake 238.

<sup>l</sup> Naish and Tatlock, 2 H. Bl. 319.

<sup>m</sup> 2 Atk. 562. Martin and Pewtreffs, Burr. 2477. 2 Vez. J. 255.

2. *In cases of Set-off, or Compensation.*

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2 Geo. 2. c. 22.

5 Geo. 2. c. 30. s. 28.

8 Geo. 2. c. 24. .

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Where transactions between parties necessarily constitute an account of debtor and creditor, composed of mutual receipts and payments, made by each respectively in the course of their dealings, it would obviously be contrary to reason, as well as the intention of the parties, to consider any thing but the balance upon taking the account, to be the real debt betwixt them, or which either should recover against the other. Accordingly in cases of account merely, and where the parties resorted to an action of account, or a bill for an account in equity; upon the judgment or decree to account, both parties were equally actors in the suit, and nothing could be recovered but the balance on one side or the other: and this is said even to have been the course allowed in such cases under commissions of bankrupt<sup>n</sup>, long before parties were permitted to avail themselves of it in other cases, either in equity or at law.

For where the debts were unconnected, however just or reasonable it might be, even in such cases,

<sup>n</sup> Anon. 1 Mod. 215.



to allow cross demands to compensate or be set off against each other, and to admit the same with respect to assignees, who stand in the place of the bankrupt, yet the positive rules and forms of law prevented it, and made it necessary for each party to sue and recover separately in separate actions: and this manifest inconvenience and injustice remained for a long time a reproach to English jurisprudence.

The first remedy that was applied was in cases of *bankruptcy*; probably only because the injustice was more glaring in such cases, where the party, as he could not even *sue* the *assignees*, was obliged to pay the whole amount on one side of the account, and only to come in under the commission, for perhaps a small dividend upon the other.

By the 4 & 5 Anne, therefore, it was enacted generally, that where mutual credit had been given between the bankrupt and any other person, the commissioners or assignees should take the account, and that no more should be paid than what should appear to be due upon the balance. This, however, was only in cases of *bankruptcy*; and though the provisions of this Act were continued by subsequent statutes through the succeeding reign, the example was not followed and applied to other cases, till the 2 & 8 Geo. 2. which allowed mutual debts to be set against each other, either by being pleaded in bar, or given in evidence upon the general issue.

BOOK III.  
CHAP. V.  
SECT. I.

---

Upon the expiration of the 4 & 5 Anne, and of the other statutes continuing the clause in that relative to mutual credit in the case of bankrupts, a provision to the same effect, but considerably improved in point of precision, was re-enacted by the 5 Geo. 2.

As this statute, however, seemed to relate only to proceedings under a *commission*, and the statutes of Geo. 2. on the other hand did not in express terms include the case of *assignees*, the courts of law continued for some time to struggle for an exemption from the rules of justice and good sense, in holding<sup>o</sup> that *none* of the statutes extended to assignees in actions at law; and upon this ground, that mutual debts implied mutual remedies, whereas assignees could not be sued for a debt from the bankrupt (69). Yet it seems to have been established, before then, in courts of equity, not only that commissioners were within the equity of the 2 Geo. 2.<sup>p</sup>, but also that the parties in an action had no need to apply to a court of equity, because they might avail themselves of the 5 Geo. 2. at law, in the same man-

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<sup>o</sup> Ryall and Larkin, 1 Will. P Exp. Riley, 2 Kel. 24.  
255.

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(69) This objection (which was taken too *on behalf* of the *assignees*) of the want of mutuality in respect of the defendant's not being able to sue for his whole debt, seems to have been the very circumstance of hardship and inequality that occasioned the first example of a legislative provision with respect to set-off, to be given in the case of bankrupts.

ner as under the 2 & 8 Geo. 2. in other cases<sup>9</sup>. The determination alluded to<sup>r</sup>, however, has since been expressly over-ruled, the assignees being considered as the bankrupt, and standing in his place<sup>s</sup>: and the several statutes are now considered as applying equally to actions, or to proceedings under a commission, and the same rule of construction of them adopted, in the one case or the other, or whether the question arises upon a summary petition, or a formal bill, or an action at law<sup>t</sup>.

BOOK III.  
CHAP. V.  
Sect. 1.

In almost all the questions that have been made upon the subject of set-off, the *mutuality* of the respective debts or credits, has been considered in three different ways; 1. *in respect of their nature and consideration*; 2. *in respect of the times of their accruing or constitution*; and lastly, *in respect of the parties*: and it may be useful to consider the cases under these separate heads, though some of them may illustrate, and afford authority, for several or all the different points.

1. *Mutuality of the debts in respect of their Nature and Consideration.*

Though simple contract debts were allowed in a court of equity to be set off under the 4 & 5 Anne<sup>u</sup>, against specialty debts, yet a narrow construction of the 2 Geo. 2. having been adopted, in some

<sup>9</sup> Lock and Bennett, 2 Atk.

49.

<sup>r</sup> Ryall and Larkin.

<sup>s</sup> Ridout and Brough, Cowp.

133.

<sup>t</sup> Burr. 2221. Dickson and Evans, 6 T. R. 57.

<sup>u</sup> Laneborough and Jones, 1 P. W. 325. Downam and Mathews, Pre. Ch. 580.



BOOK III.  
CHAP. V.  
Sect. I.

instances, namely, that it applied only to cases where the debts on both sides were deemed in law to be of the *same nature or degree*, the benefit of set-off was afterwards by the 8 Geo. 2. extended expressly to debts also of *different natures*; requiring only, where the debt arose by reason of any penalty contained in any bond or specialty, that the party should plead it, and in his plea set forth the precise amount of the sum really due.

With respect to the *Consideration* of the debts, or to the manner in which they arise respectively; as the construction of the statutes has never been confined to the case of mutual running accounts<sup>x</sup>, but has always been extended to many cases where an action for an account would not lie, nor an account be decreed upon a bill in equity<sup>y</sup>, it being, indeed, for such cases that the statutes seem to have been intended specifically to provide; so neither has it been confined to dealings *in trade* only, but has been extended to *all* cases of *mutual credit*<sup>z</sup>. And no case has yet occurred in which any distinction has been made, upon the ground of the consideration; but even such debts have been allowed to be set off as could not have been brought into any account betwixt the parties; such as debts arising to the one party, not by contract, but by reason of a fraud in the other, and therefore not a mutual credit. As where a cre-

<sup>x</sup> Laneborough and Jones,  
1 P. W. 325.  
<sup>y</sup> 1 Atk. 229. 237.

<sup>z</sup> Laneborough and Jones,  
1 P. W. 325. Ryall and Rolle,  
1 Atk. 185.

ditor, for an interest in certain property conveyed to him by the bankrupt, advanced a sum short of the full consideration, the deficiency of the consideration was held <sup>a</sup> to be a subject of set-off within the statutes, as a debt in equity, though not such a debt as the party himself to the usurious contract might have had a remedy for at law.

BOOK III.  
CHAP. V.  
Sect. I.

2. *In respect of the Times of their accruing.*

Consistently with the rule by which no creditors, whose debts do not accrue *before* the bankruptcy, are relievable under a commission; and also upon the express words of the 5 Geo. 2. relative to mutual debts and credits; none can be set against each other by way of set-off, unless where *each* debt or credit respectively accrued, or was given *before* the bankruptcy.

Upon these grounds, there can be no set-off in respect of *contingent* debts where the contingency does not take effect till after the bankruptcy; whether the contingency relate to the existence, or to the amount of the debt <sup>b</sup>. But in the same manner as a debt, vested in the party, and in its nature *capable* of being ascertained *before* the bankruptcy, though its amount is not *actually* ascertained till *after*, may be proved, so a debt of that kind may be the subject of set off.

A bankrupt, therefore, having delivered to his insurance broker a policy to receive a loss upon it of

<sup>a</sup> Ryall and Rowles, 1 Vez. Hancock and Entwistle, 3 T. R.

375.

433.

<sup>b</sup> Exp. Groome, 1 Atk. 119.

BOOK III.  
CHAP. V.  
SECT. I.

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the underwriter, which loss happened *before* the bankruptcy, the broker was allowed<sup>c</sup> to set off a debt due from the bankrupt to him on account of premiums, against what he owed the bankrupt for the money received by him of the underwriter; though the loss was not *adjusted*, or the money actually *received* upon it, till *after* the bankruptcy; this being considered as a debt due before the bankruptcy, though not ascertained (70).

And debts *certainly* payable at a *future day*, though this happen after the bankruptcy, and which are by the 7 Geo. 1. placed upon the same footing with debts payable before the bankruptcy, may be set off as mutual debts within the 5 Geo. 2: the statutes being to be construed together, and such a debt if it is not in strictness a mutual *debt*, may at least be a mutual *credit*<sup>d</sup>.

<sup>c</sup> Whitehead and Vaughan,  
Co. B. L. 579. and see below,

Grove and Dubois.

<sup>d</sup> Exp. Prescott, 1 Atk. 230.

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(70) In this case there might clearly be a debt due from the *underwriter*, when the loss happened, *before* the bankruptcy, though not *ascertained* till *after*; but it may, perhaps, not appear to be so clearly a *debt*, properly speaking, from the *broker* (who does not appear to have had a commission *del credere*) till he received the money. The *intrusting* him, however, with the policy, for the money upon which, he was to account when received, constituted perhaps, a *credit*; and upon the ground of *lien* also, the broker was at all events entitled to retain. See S. C. below, under title *Certain cases of Lien*.

For



For the clause of mutual credit goes much further than that of mutual debts; and though the debt claimed to be set off may not arise as a *debt*, strictly speaking, till *after* the bankruptcy, yet if the *ground* of it constituted a *credit* between the parties before, it may be set off under the clause of mutual credit.

As where a bankrupt, before his bankruptcy, joined with two other persons in an adventure, whereon one of them was to advance the money to purchase some pearls, and the profit and loss were to be divided between them in thirds, when the pearls should be sold; the latter, who was to account for the sale of the pearls, was allowed to set off a debt due to him from the bankrupt for *goods sold before* the bankruptcy, against the *third of the adventure* due from him to the bankrupt; though the pearls were *not sold* or the *produce received* till *after* the bankruptcy<sup>e</sup>. This, though no mutual *debt* before the bankruptcy, yet was a mutual *credit*, the bankrupt having trusted him with the pearls, and he having trusted the bankrupt with the other goods, which probably he would not otherwise have done. And a *trust* between two persons, was held<sup>f</sup> to constitute a mutual credit.

A bankrupt having, before his bankruptcy, agreed with a person, who was surety for him by bond, that the latter should retain out of any money

<sup>e</sup> French and Fenn, Co. B. L. 569.

<sup>f</sup> See also Atkinson and Elliott, 7 T. R. 378.

BOOK III.  
CHAP. V.  
Sect. I.

due by him to the bankrupt, whatever he should pay on the bond; the surety was allowed, against a debt from him to the bankrupt for goods sold before the bankruptcy, to set off what he paid upon the bond after it<sup>z</sup>; this being considered as a *mutual credit before the bankruptcy*, upon the *agreement*, and to which the subsequent payment had a retrospect. At the same time this case was principally rested, not on the ground of set-off, but on that of the special agreement; under which, the goods were *not to be* paid for, *till* the bond was discharged by the bankrupt, and which not being done, the assignees, standing in his place, had no cause of action according to the terms of the original contract.

But a transaction has, in a particular case, been held to be a mutual credit, though its operation *seemed contrary* to an *agreement* of the parties. For a vendor, of several parcels of goods sold to the bankrupt, for which the latter gave his acceptances payable at different times, having received of the bankrupt, at the time one of them became due before the bankruptcy, a bill of exchange for a greater amount, and given an undertaking to pay over the *difference* when received, was allowed to retain it for the debt due to him upon the other parcels which were not paid for at the time of the bankruptcy<sup>b</sup>; this constituting a mutual

<sup>a</sup> Dobson and Lockhart, 5 T.  
R. 133.

<sup>b</sup> Atkinson and Elliott, 7 T.  
R. 378.

credit;

credit ; on the one side to the bankrupt upon his acceptances, the obligation to pay which, at all events, at a future day, was not superseded by the agreement ; and on the other, by giving the bill.

Notwithstanding the general rule, that in order to be the subject of a set-off, the *debt* or *credit* must accrue or be given *before* the bankruptcy, yet it may not always be *competent* to assignees to avail themselves of the objection to it upon that ground.

Accordingly, where a bankrupt, before the 19 Geo. 2. relative to payments in the course of trade, had after a secret act of bankruptcy, mutual dealings with a person to whom he made several payments, and the assignees brought an action to recover these payments as made after the bankruptcy, the defendant was permitted in equity, to set off payments made by him on account of the bankrupt during the same period ; upon the ground, that the assignees, declaring in *assumpsit* which is founded upon *contract*, affirmed the acts of the bankrupt ; and affirming the transaction as to part, they could not disaffirm it as to the rest<sup>1</sup>. This too was after a verdict at law, where the set-off had been disallowed ; but which was held not to be conclusive, because, the assignees proceeding on the foundation of *contract*, it was a matter of account, and therefore a proper subject for the jurisdiction of a court of equity.

<sup>1</sup> Billon and Hyde, 1 Vez. 326. 1 Atk. 126.

And



BOOK III.  
CHAP. V.  
Sect. 1.

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And in some cases of actual *fraud*, if the assignees bring *assumpsit*, the party may have the benefit of a set-off, which he could not have had, if they had sued as for a *tort*. So one who was a debtor to the bankrupt for goods sold before the bankruptcy, and creditor by a bill drawn before, but not paid till after the bankruptcy, was allowed to set off the money paid upon the bill, against the debt for the goods, though the sale was fraudulent as against the rest of the creditors<sup>k</sup>: for the assignees, declaring in *assumpsit*, and thereby affirming the transaction as a contract of sale by the bankrupt, were therefore bound by it in the same manner as the bankrupt, against whom the party would clearly have been entitled to the set-off.

But if a banker *receives* and *pays* money on account of a bankrupt, after *notice* of his bankruptcy, he cannot set off the payments against the receipts<sup>l</sup>.

### 3. *In respect of the Parties.*

*Each* of the parties must be both debtor and creditor.

An insurance broker *having a del credere commission*, may, against premiums due to the underwriter upon policies underwritten by him, set off losses upon the policies happening before the underwriter's bankruptcy, though not paid by the broker to the insured

<sup>k</sup> Smith and Hodson, 4 T. R. 211.

<sup>l</sup> Vernon and Hankey, 2 T. R. 113. 3 Bro. 313.

till after<sup>m</sup>: these being mutual debts between the broker and the underwriter. A commission *del credere* is an absolute engagement from the broker to the principal, and though the latter may resort to the underwriter as a collateral security, yet the broker is liable to him at all events, and in the first instance. On the other hand, the underwriter often knows nothing of the principal, and it makes no difference if he does; he trusts to the broker, and the credit is given to him and not to the insured. But a broker cannot set off in that way, where he has *not* a commission *del credere*, for there, the loss is due only to the insured, and not to the broker.

BOOK III.  
CHAP. V.  
Sect. I.

*Each* of the parties must also be debtor and creditor in the *same right*.

A *proprietor of stock* in a public company, being indebted to the *members* of it for a loan of money before his bankruptcy, the assignees were held intitled to have the whole stock transferred to them, as being a case not within the statutes<sup>o</sup>: first, because the loan was not made on the credit of the stock; next, because each party was debtor and creditor in different rights, the proprietor holding the stock as a member of the company in their corporate capacity, but indebted to them upon the loan as private persons; and lastly, the company had no lien upon the stock, be-

<sup>m</sup> Grove and Dubois, 1 T R.

112. Bize and Dickson, ib. 285.

<sup>n</sup> Wilson and Creighton, cited

1 T R. 113.

<sup>o</sup> Megliorucchi and R. E. Ass.

Company, 1 Eq. Abr. 9.

cause

BOOK III.  
CHAP. V.  
Sect. I.

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cause they had no such special property in it as could give them a lien; they being vested with the whole in their corporate capacity only for the particular purposes directed by the act, but the specific stock of each proprietor being vested in himself only.

But where a proprietor of stock was indebted to a company in a sum of money as their banker or cashier, the company was allowed to retain this debt out of the stock and dividends belonging to the bankrupt<sup>a</sup>: this being considered as a mutual credit, and *there being an express bye law* which subjected the stock of each adventurer to be distrained for such debts as he should owe to the company; and the assignees could take in no better right than the bankrupt himself.

An *executor* cannot, against a debt due from himself on his *own account* to the bankrupt, set off a debt due from the bankrupt to the *testator*; the debts being due in different rights<sup>r</sup>. Nor though the executor is also *residuary legatee*; as it would require an account to be taken of the testator's whole estate, to see if there was a surplus to afford a subject of set-off, and might occasion infinite expence, it being often doubtful whether executors can take a residue<sup>s</sup>.

Nor can a debt due from the *assignees* in their *own right* after the bankruptcy, be set off against

<sup>a</sup> Gibson and H. B. Company,  
Str. 645. 7 Vin. 124.

<sup>r</sup> Bishop and Church, 3 Atk.  
691.

<sup>s</sup> S. C.



a debt due to the *bankrupt* before it ; nor a debt due from the bankrupt before the bankruptcy, against one due to the assignees after it<sup>t</sup>.

BOOK III.  
CHAP. V.  
Sect. I.

Upon the ground of want of *mutuality* in respect of *Parties*, may be considered the cases where a debtor of the bankrupt before the bankruptcy, becomes a creditor by procuring a debt from the bankrupt to be assigned to him after the bankruptcy. A creditor upon a bill of exchange of the bankrupt's indorsed to him before the bankruptcy, may set it off against a debt due from him to the bankrupt for goods bought after the indorsement, and also before the bankruptcy ; though the bankrupt did not know that the bill was indorsed to, and in the possession of the party at the time<sup>u</sup> : for the sending of a bill out into the world gains a *credit* to the *party*, with every person who takes the bill.

But it is otherwise if it comes into his possession *after* the bankruptcy. In *common* cases, of a set-off of a bill or note indorsed, the indorsement must be proved to be before plea pleaded<sup>x</sup> ; and in cases of bankruptcy, a debtor of the bankrupt will not be allowed to set-off a note, or bill, or cash note, indorsed or transferred to him *after* the bankruptcy<sup>y</sup>. Though the *debt*, as against the *bank-*

<sup>t</sup> Ridout and Brough, Cowp.

<sup>x</sup> Lucas and Marsh, Barnes

133.

453.

<sup>u</sup> Hankey and Smith, 3 T.

<sup>y</sup> Marsh and Chambers, Str.

R. 507.

1334

*rupt,*

BOOK III.  
CHAP. V.  
Sect. I.

*rupt*, may exist before the bankruptcy, yet it is not to the same *party*; and though such a debt were allowed to be *proved*, that is very different from the operation of a *set-off*; for, by the former, no *new* charge at least is brought upon the estate which it would not have been liable to at the time of the bankruptcy, but which there is in the latter: and a creditor cannot be permitted to vary the relation in which he stood to the bankrupt's estate at that time, by an act *ex post facto*, in a transaction with a third party, and thereby to put himself in a *better* condition than the rest of the creditors <sup>2</sup> (71).

<sup>2</sup> Exp. Hale, 3 Vez. J. 304. Dickson and Evans, 6 T. R. 57.

(71) There are some instances, in which a set-off has been allowed, seemingly in separate rights; which though they did not occur expressly in cases of bankruptcy, are too important for the general principle, to be here omitted. From the case of George and Claggett, (7 T. R. 359.) and other cases there cited, it appears that where a party being only an agent, acts ostensibly as the real or sole owner, as in the case of a factor concealing his principal, or an acting partner his partners; the buyer of goods from him, may in an action by the principal in the one case, or the firm in the other, set off a debt due to him from the factor, or acting partner respectively: upon the ground, that the parties by their conduct having enabled their agent to gain credit as the sole owner, and the buyer having *bonâ fide* contracted with him in that character, they cannot recover against the buyer without allowing him the same advantages and equities in his defence, that he would have had against their agent.

3. *Assignees interest in Certain cases of Lien.*

Intimately connected with the law of set-off, is that upon the subject of lien. Though these several rights frequently concur, and the benefit arising to the party is the same in effect, whether considered in one way or the other, yet they are in themselves essentially distinct; a right of set-off existing in many cases where there is no subject of lien, and a party having, in other cases, that benefit arising from a lien, which he could not otherwise have had by a set-off. A debt on one side, and goods or specific property of the debtor in possession of the creditor on the other, are not the subject of set-off, strictly as mutual debts: partly because the possession of such specific property does not properly constitute a debt, and perhaps also because such specific property does not readily admit of the value being liquidated and ascertained. However that may be, the statutes for setting off mutual *debts* have been held to extend, not to goods or other specific things, but only to pecuniary demands on one side and the other<sup>a</sup>. But those with respect to mutual *credit*, admit and have received a more liberal construction; and the courts, considering the hardship that a person having goods in his possession as a security, or on which he has a lien, for a part of his debt, should be obliged to relinquish

<sup>a</sup> BURR. 2221.

them



BOOK III  
CHAP. V.  
Sect. I.

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them without first having a satisfaction out of them as far as they will extend, for the whole of his debt, have always inclined to consider such cases as within the clause of mutual credit, wherever the circumstances have afforded any opportunity, either of considering the transactions as a matter of account, or of implying, from the manner of dealing between the parties, an agreement that the goods should be a security for the whole debt, and that the credit was given upon that ground, although there should not be direct evidence of a positive agreement for that purpose<sup>b</sup>.

The present title is not meant to comprehend the subject of lien under all the relations in which it occurs in the bankrupt law, these requiring perfectly distinct and separate considerations; but is intended to apply only to that kind of lien which a creditor acquires in any property of the bankrupt, coming into his hands in the course of their dealing, for the purpose of exercising some employment or commission with respect to it, and where the credit having been given by reason of such property in his hands, this is *construed* as a *pledge*, which he has a right to *retain* to satisfy the debt due to him from the owner, who has then only the right of *redemption* (72).

<sup>b</sup> 1 Atk. 229. 236.

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(72) In these cases the lien and the actual possession concur in the same person. For those in which they do not, see above, title *Nature and Extent of the interest that vests in assignees Generally*; and below, titles *Factor*, and *Possession as Reputed Owner*.

With

With such other liens, acquired without fraud or collusion, *before* the act of bankruptcy (for after that time no lien can be gained<sup>c</sup>, nor even after the first arrest, in the case of lying two months in prison<sup>d</sup>), the bankruptcy does not interfere, nor deprive the creditor of an advantage thus fairly obtained. For though the object of the bankrupt law is to reduce all creditors to an equality, and to make of the whole of a bankrupt's property a common fund for the benefit of them all; yet this is to be understood, in respect only of such creditors as have equally given a general personal credit to the bankrupt. Nor have the general creditors any reason to complain of the advantage which particular creditors thus derive from liens fairly acquired; in as much as it is by those who part with their goods to a trader, or leave them in his possession, trusting to his personal credit, that he is enabled to gain credit with other people, and whereby others are induced to trust him; but which is not the case with one who gives him credit no farther than he has property of the bankrupt actually in his hands to answer it, and in which he so acquires a specific interest. Courts of law and equity, therefore, as well on principles of natural justice, as for the convenience and benefit of trade, have always been favourable to liens; and inclined to support them equally in the case of *assignees*,

<sup>c</sup> Exp. Bush, 7 Vin. 74. Ver-  
non and Hankey, 2 T. R. Cop-

land and Stein, 8 T. R. 199.

<sup>d</sup> Exp. Lee, 2 Vez. J. 285.

BOOK III.  
CHAP. V.  
Sect. I.

who, as standing in the place of the bankrupt, must take his property subject to the same liens which would affect it in the case of the bankrupt himself.

A lien is either constituted by *express contract*; or it may be *implied*, from the usage of trade or the mode of dealing, in the particular case<sup>e</sup>; and is also either a *general lien* for the balance of a general account betwixt the parties, or a *partial lien* extending only to what is due for particular charges.

*Tradesmen* generally, have by the custom of trade a partial lien, for the price of their labour upon the specific goods in their hands; and may retain them, as a pledge to that extent<sup>f</sup>. And it has been determined particularly in the case of a *millers*<sup>g</sup>, and of a *dyer*<sup>h</sup>, that they have no other than this common lien, which other trades have by the general rule of law, for the price of their labour bestowed upon the specific goods in their hands; namely, the one for the price of grinding the corn, and the other for that of dying the cloths; there appearing in neither case, either any express contract to carry it further, or any usage of trade or particular mode of dealing from which it might be implied.

<sup>e</sup> 1 Atk. 229. 236, 7. Burr.  
2221.

<sup>f</sup> 1 Atk. 229. 236.

<sup>g</sup> Exp. Ockenden, 1 Atk. 235.

<sup>h</sup> Green and Farmer, Burr.  
2214.



The *master* of a *ship* has no lien upon it for his *wages*<sup>1</sup>. The usage of trade is against such a lien, founded probably upon the inconvenience, if a master whom the owner may at any time remove, could detain a ship which is daily earning a profit to the owner. It is always understood, therefore, that a master contracts, not upon the credit of the ship, but personally with the owner.

BOOK III.  
CHAP. V.  
Sect. I.

But the *mates* and other *mariners* have a lien for their *wages*, they contracting upon the credit of the ship<sup>k</sup>.

Nor has the *master* a lien for *repairs* done, or for provisions and materials furnished for the ship *at home*; but it is otherwise, if done in a *foreign* port, and while the ship is upon her voyage<sup>l</sup>. Repairs, &c. done abroad, while upon the voyage, when no contract can be made with the owner, are a lien upon the ship, from necessity, and for the encouragement of trade<sup>m</sup>.

But persons who would not otherwise have a lien, except for the price of work done on the specific goods in their possession, may, by express contract, obtain it also for the balance due for other goods, before done and delivered by them. And a general agreement, by a number of persons in trade, as dyers, dressers, bleachers, whisters, prin-

<sup>1</sup> Wilkins and Carnichael, Dougl. 97.

<sup>k</sup> S. C.

<sup>l</sup> S. C. and Exp. Shank, 1 Atk. 234.

<sup>m</sup> Watkinson and Barnardiston, 2 P. W. 367.

BOOK III.  
CHAP. V.  
Sect. I.

*ters*, and calenderers (73), to take work only upon the terms of having such an extended lien, and giving notice of it by public advertisement, has been held not to be illegal<sup>n</sup>; being only an agreement to enforce what the law favours, and considers as naturally just and equitable. From this case it might be inferred that a calico *printer* generally, had only a lien for the price of printing the specific goods in his hands; but in one case<sup>o</sup>, it appears to have been held that he has a lien also for the price of others before delivered by him (74).

The chief and leading example of a *general* lien, is the case of a *factor*; who, by the custom of trade, has a lien upon all goods of his principal that come into his possession, not only for incident charges, but as an item of mutual account, for the general balance due to him<sup>p</sup>. And he has it not only for money actually advanced to his principal, but also for a debt in which he is only a surety for him; and although he does not *pay* it till *after* the bank-

<sup>n</sup> Kirkman and Shawcross,  
6 T. R. 14.

<sup>o</sup> Exp. Andrews, Co. B. L.  
460.

<sup>p</sup> Kruger and Wilcox, Ambl.  
252. Goodin and L. Ass. Comp.  
Burr. 494.

(73) I have inserted the enumeration contained in the case cited, only because that with respect to such persons it affords a presumption that there is at least no general lien by any usage of trade amongst *them*.

(74) Upon what grounds, does not appear from the report.

ruptcy;

ruptcy<sup>q</sup>; provided the delivery of the property to him, and his becoming surety were *before* it<sup>r</sup>; for the lien attaches upon his becoming surety, which is the same thing as if he lent him the money<sup>s</sup>.

A *packer*, being in the nature of a factor, has been held<sup>t</sup>, as such, to have a lien for his general balance.

A *banker* has, upon all bills or notes in his hands, paid in generally, a lien for the general balance due to him<sup>u</sup>.

An *insurance broker* has a general lien, upon *policies* in his hands; for premiums, or for a general balance due to him from the principal<sup>x</sup>.

So an *attorney* upon *papers*<sup>y</sup>.

With respect to the *possession*, on which such liens are founded, it is clear that in general, till the goods once come into possession, no lien can be gained<sup>z</sup>. On the other hand, in cases where a lien would otherwise be presumed, it may be defeated by the conditions on which the possession is given; as, if in the case of a factor or broker, goods are delivered to him to be sold, for which

<sup>q</sup> Drinkwater and Goodwin, Cowp. 251.

<sup>r</sup> Copland and Stein, 8 T. R. 199.

<sup>s</sup> Drinkwater and Goodwin.

<sup>t</sup> Exp. Deeze, 1 Atk. 228. 1 Atk. 237. Burr. 2222.

<sup>u</sup> Jourdain and Le Fevre, Esp.N.P.66. Davis and Bowsher,

5 T. R. 483. Bent and Puller, ibid. 494.

<sup>x</sup> Whitehead and Vaughan, Co.B. L. 579. Parker and Carter, ib. 580.

<sup>y</sup> Exp. Bush, 7 Vin. 74.

<sup>z</sup> Kinloch and Craig, 3 T. R. 119.



BOOK III.  
CHAP. V.  
Sect. I.

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he gives a *special* receipt, promising to pay the proceeds to a *particular* person<sup>a</sup>; for such *express* stipulation puts an end to the general rule of law, which would otherwise give the factor a general lien.

A factor, or any other person having a lien, *loses* it if he parts with the possession of the property<sup>b</sup>. And this is not only agreeable to the usage of trade, but just, as between the person having the lien, and the general creditors; with whom he puts himself upon an equal footing, in trusting to the bankrupt's personal credit<sup>c</sup>. But if a factor being in advance for his principal, disposes of the goods, making the buyer debtor to himself, he retains a lien upon the *price* in the hands of the buyer, who cannot, after notice, pay it to the principal or his assignees<sup>d</sup>.

And though a person loses his lien by parting with the possession of the subject, yet it will *revive* upon its coming again into his hands: and this has been held in a case of a broker, who having first parted with a policy of insurance to the principal, afterwards obtained it again, upon the *pretence* of receiving the loss from the underwriter, but really with a view to hold it as a security<sup>e</sup>.

<sup>a</sup> Walker and Birch, 6 T. R. 238.

<sup>b</sup> Kruger and Wilcox, and Goodin and L. Aff. Comp. ut supra. Exp. Shank, 1 Atk. 234.

<sup>c</sup> Kruger and Wilcox.

<sup>d</sup> Drinkwater and Goodwin, Cowp. 251.

<sup>e</sup> Whitehead and Vaughan, Co. B. L. 579.

II. *With respect to Property which the bankrupt has in the right of Others.*

BOOK III.  
CHAP. V.  
SECT. I.

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While the statutes empower the commissioners to strip a bankrupt of the whole of his property; they, at the same time, upon principles of the plainest justice, that one person's property should not be taken to pay the debts of another, expressly limit this power to that of transferring to the assignees, only *such* interest as the *bankrupt himself* had, and *such* as he might lawfully himself have disposed of for his own benefit.

I. *As Husband.*

Whatever interest a husband acquires by marriage, in the wife's property; all that he can himself dispose of, either of her legal or equitable interests, passes to his assignees, by the assignment under the commission. The rents and profits of her real estate, they take during the coverture; her personal chattels in possession, absolutely; and her chattels real and choses in action, terms, mortgages in fee or for years, debts, legacies and possibilities, in the same manner as they vested in the husband, or such interest therein as he could himself have assigned or released<sup>1</sup>.

<sup>1</sup> M'les and Williams, 1 P. W. 249. 10 Mod. 160. 243. Bosville and Brander, 1. P. W. 458. Higden and Williamson,

3 P. W. 131. Grey and Kentish, 1 Atk. 280. Robinson and Taylor, 2 Bro. 589. Pringle and Hodgson, 3 Vez. J. 617.

As to choses in action, not actually reduced into possession by the husband, or the assignees during his life-time; the bankruptcy and assignment seems to have been considered as such a reducing into possession as was sufficient to bar the wife's contingency of survivorship<sup>g</sup>. But with respect to a legacy, it is reported in one case to have been held otherwise<sup>h</sup>; and in another, that the assignees were entitled only during the bankrupt's life to receive the interest of a legacy left to the wife<sup>i</sup>.

If the wife is a sole trader, carrying on a separate trade, according to the custom of London, the assignees of the husband cannot take her effects in her separate trade<sup>k</sup>.

Where the husband or his assignees can come at the wife's property at law, a court of equity will not interfere with the legal title; though *Ld. Hardwicke* seemed to think<sup>l</sup>, the court might perhaps, even in a case of that kind, relieve upon the application of the wife. But wherever the property cannot be obtained without the aid and intervention of a court of equity, that court will not assist the assignees, or allow them to take the property, but upon the same terms as the husband himself; in whose place the assignees stand, and who must

<sup>g</sup> *Miles and Williams*, 1 P. W. 255. *Pringle and Hodgson*, 3 Vez. J. 619.

<sup>h</sup> *Gayer and Wilkinson*, 1 Bro. 50.

<sup>i</sup> *Jacobson and Williams*, 1 P. W. 383.

<sup>k</sup> *Lavie and Phillips*, Burr. 1776.

<sup>l</sup> *Jewson and Moulson*, 3 Atk. 420.



take it subject to the same equity, namely, of first making a settlement or provision out of it for the wife<sup>m</sup> (75). And though the compelling of settlements at first arose upon the *husband's* coming into a court of equity for assistance<sup>n</sup>, yet in many of the cases here cited, the court enforced this equity for the wife, against the assignees, although these were not plaintiffs *asking* the aid of the court; so that it seems immaterial whether the wife or the

<sup>m</sup> Jacobson and Williams, 1 P. W. 382. Botville and Brander, ib. 458. Jewson and Moulson, 2 Atk. 417. Brown and Jones, 1 Atk. 190. Grey and Kentish, ib. 280. Exp. Coysegame, ib. 192. Worrall and Marlar, 1 P. W. 459. Prior

and Hill, 4 Bro. 139. Burdon and Dean, 2 Vez. J. 607. Os-  
well and Probert, ib. 680.  
Freeman and Pasley, 3 Vez. J.  
421. Holland and Culliford,  
2 Vern. 662.

<sup>n</sup> Scriven and Tapley, Ambl.  
509.

(75) As it seems formerly to have been held, that a particular assignee of the husband, for a valuable consideration, was not liable to this equity, the case of the assignment in bankruptcy has been distinguished from that, as being an assignment merely by operation of law; see Jewson and Moulson, and Worrall and Marlar. But even if the assignees in bankruptcy were, as they may to some purposes be, considered as assignees for a valuable consideration, and not as having the property cast upon them merely by operation of law, like executors to whom they have in this respect been compared, yet they would not be the less liable to the equity of making a provision for the wife, according to the doctrine now held, that this cannot be defeated even by an assignment for a valuable consideration (Pope and Crashaw, 4 Bro. 326. Like and Beresford, 3 Vez. j. 511. Macauley and Phillips, 4 Vez. j. 19. and see Deekes and Strutt, 5 T. R. 692.).

assignees

BOOK III.  
CHAP. V.  
Sect. I.

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assignees are plaintiffs, provided the property is a subject of equitable cognizance<sup>o</sup> (76).

This equity extends to such interest as the husband takes in the life estate of the wife, or property intended for her maintenance; though he might be considered as a purchaser of the fund for maintenance, by the obligation he comes under to maintain her and to pay her debts<sup>p</sup>. But, as the husband himself, if he does not support her, cannot have the whole of a fund which is considered as intended for the mutual maintenance of both; so neither can his assignees, when he becomes a bankrupt; for they taking in the right of the husband, stand in the place of a husband not maintaining his wife<sup>q</sup>.

A settlement before marriage, of *part* of the wife's property to her separate use, is held not to

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<sup>o</sup> See Mr. Cox's note, 1 P. W. 459.  
<sup>p</sup> Prior and Hill, 4 Bro. 139.

<sup>q</sup> Oswell and Probert, 2 Vez. J. 680.

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(76) In a case, (not in bankruptcy, but) where an executor brought a bill for the direction of the court with respect to a legacy left to a wife, and to have it applied towards a provision for her, the husband opposed it upon the ground that there was no precedent for such a thing, except where the husband himself brought a bill. Ld. Macclesfield said, "then it is time to make one; can the difference, who is plaintiff, alter the reason of the thing?" And he directed accordingly (Gardiner and Walker, Str. 503.).

bar her equity to have a further provision out of the rest<sup>r</sup>.

BOOK III.  
CHAP. V.  
Sect. I.

This equity does not appear in any case to have been extended to the *issue*, after the wife's death. *Ld. Hardwicke*, in a case before him<sup>s</sup>, where the issue were otherwise well provided for, said he would not make the first precedent of it, whatever the court *might* do under *other* circumstances. In a subsequent case, however<sup>t</sup>, (but not in bankruptcy), he said, it was personal to the wife, and refused to carry it further, for the ill consequences to creditors.

But if property is given to the wife, either expressly or by necessary construction, to her sole and separate use; it is not liable to the creditors of the husband, and his assignees have no title to it<sup>u</sup>.

And where the legal estate is vested in the husband, under circumstances in which the husband himself would be considered as a trustee for the wife, the assignees will take subject to the same trust; as where in a marriage settlement, an estate intended for the wife's separate use during life, being by mistake limited to the use of the husband for life, and the husband having thereupon given to the trustee

<sup>r</sup> *Burdon and Dean*, 2 *Vez.* J. 607.

<sup>s</sup> *Hearle and Greenbank*, 3 *Atk.* 717.

<sup>t</sup> *Scriven and Tapley*, *Ambt.* 509.

<sup>u</sup> *Vandenanker and Desborough*, 2 *Vern.* 96. *Bennet and Davis*, 2 *P. W.* 316. *Tyrrell and Hope*, 2 *Atk.* 558. *Hearle and Greenbank*, 3 *Atk.* 715. *Kirk and Paulin*, 7 *Vin.* 95. pl. 14.



a note under his hand, that the wife should take the estate to her separate use, according to an agreement made previous to the settlement; it was held<sup>x</sup> that the husband being to be considered as a trustee for the wife, the assignees should be trustees in the same way.

Sowhere lands were devised to the wife for her sole and separate use, but the testator had omitted to appoint trustees<sup>y</sup>; the court considered it to be clearly a trust in the husband, and that there was no difference where the trust was created by the act of the party, and where by the act of law; and decreed that the assignees, who, as claiming under the husband, could have no better right than he had, should join in a conveyance to a trustee for the wife.

And a settlement, after marriage but for a valuable consideration, made by lease and release, was sustained against assignees<sup>z</sup> in the same manner as it would have been against the husband himself, though the lease for a year was lost.

Articles before marriage, by which the wife's portion was settled to the use of the husband for life, and if he failed in the world, to trustees for the separate maintenance of the wife and children, have been held good against the assignees<sup>a</sup>; it not

<sup>x</sup> Tyrrell and Hope, 2 Atk. 558.

<sup>y</sup> Bennet and Davis, 2 P. W. 316.

<sup>z</sup> Brown and Jones, 1 Atk. 38.

<sup>a</sup> Lockyer and Savage, Str. 947.

being a provision out of the bankrupt's estate, but the settlement of her own fortune.

BOOK III.  
CHAP. V.  
SECT. I.

The wife's *dower* is not affected by the subsequent bankruptcy of the husband <sup>b</sup>.

2, 3. *As Trustee generally, or as Executor or Administrator.*

Such property as the bankrupt holds merely and *bonâ fide* as a *trustee* for others, does not come at all under the disposal of the commissioners <sup>c</sup>. And even *money* received by him in that capacity, if it is kept by itself so as to be specifically distinguished, will not pass by the assignment <sup>d</sup>.

Nor what he takes as *executor* or *administrator* <sup>e</sup>; whether specific effects, or money, if it can be ascertained to belong to the testator <sup>f</sup>.

If by marrying the executrix or administratrix of a former husband, he becomes possessed of effects which she had in that capacity, they are not liable to his debts; and as he can have them in no better right than the wife had, his assignees are not entitled to them <sup>g</sup>.

But if a bankrupt executor is also residuary legatee, and having collected sufficient to pay debts and legacies, there are assets outstanding, the assignees will be entitled to them; and though the

<sup>b</sup> Good. 90.

<sup>c</sup> 2 P. W. 318.

<sup>d</sup> King and Egginton, 1 T. R. 370.

<sup>e</sup> 1 P. W. 254. 256.

<sup>f</sup> Howard and Jemmett, Burr.

1369.

<sup>g</sup> Ludlow and Browning, 11 Mod. 138. Exp. Marsh, 1 Atk. 158.

BOOK III.  
CHAP. V.  
Sect. I.

legal interest remains in the bankrupt himself, he having them in *autre droit*, yet if he refuses to get them in, the court of Chancery will permit the assignees to sue for and recover them in his name<sup>h</sup>.

For the security of creditors and legatees of a testator, the court will appoint a receiver<sup>i</sup> to get in the effects unreceived; and order the bankrupt or his assignees to deliver over to the receiver such part of the effects as have already been received, and remain in specie, to be paid in a course of administration.

To the case of a trustee, or executor who acts in *autre droit*, has been compared that of a *parson* who holds a living in right of the church; and though there has been no express determination upon the point, Ld. Hardwicke was inclined to think<sup>k</sup> that a commission of bankrupt would not supersede the bishop's authority to apportion a *part* of the living to serve the cure; but that, in the same manner as under an execution at law, after the bishop had allotted a sufficient part of the living for the service of the cure, the *remainder* might be *assigned* under the commission.

#### 4. *As Factor.*

A *factor* is considered as being exactly upon the footing of a trustee<sup>l</sup>, and therefore whatever pro-

<sup>h</sup> Ambl. 74. 1 Atk. 213,

<sup>i</sup> Exp. Ellis, 1 Atk. 101.

<sup>k</sup> Ezp. Meymot. 1 Atk. 200.

<sup>l</sup> Burdett and Willett, 2 Vern. 638.



perty is in his possession, in that character, at the time of his bankruptcy, does not pass by the assignment under his commission; but belongs specifically to the principal or owner<sup>m</sup>, who has a lien upon it as his own property; and the bankrupt is only a trustee or agent for him, having, however, upon his part also, a lien upon it, for any debts due to him from the principal, upon the general account betwixt them<sup>n</sup>.

And even if the factor sells the goods for money, which he lays out in the purchase of *other goods*; these also will not, it is said, be affected by the assignment<sup>o</sup>.

Or if he takes *notes* from the buyer, for the price; the owner is entitled to the notes, and the assignees, receiving the money, will be obliged to refund it<sup>p</sup>.

If he sells the goods, payable at a future day, and they are unpaid at the time of the bankruptcy, the price in the hands of the buyer is not assignable; for the *debt* is due not to the *factor* but to the *principal*; who may recover it of the assignees, if paid to them; whether in ordinary cases<sup>q</sup>, or where the factor has a com-

<sup>m</sup> Copeman and Gallant, 1 P. W. 314. Godfrey and Furzo, 3 P. W. 185. Exp. Dumas, 2 Vez. 585.

<sup>n</sup> See above, p. 212. and Hollingworth and Tock, 2 H. Bl. 501.

<sup>o</sup> Whitecomb and Jacob, Salk. 160.

<sup>p</sup> Scott and Surman, Davis 458. and cited 2 Vez. 586.

<sup>1</sup> Atk. 234. 172. by the name of Salmon and Scott.

<sup>q</sup> Garratt and Cullum, Bull. N. P. 41.

mission

BOOK III.  
CHAP. V.  
Sect. I.

*mission del credere*<sup>r</sup>. The buyer, paying the factor without notice from the owner, is discharged as against the latter; but the factor's selling under a *commission del credere*, does not take away the owner's right against the buyer, who is still liable to him, if he has notice before payment<sup>s</sup>. A factor's sale, by the general rule of law, creates a contract between the owner and the buyer; and the only difference, as to a sale under a *commission del credere*, is that the owner has in that case a double security, both the buyer and the factor.

All these are cases where the goods, or their produce remain, at the time of the bankruptcy, in a situation in which they can be *specifically distinguished* from the rest of the bankrupt's property: but where the factor sells, and receives the *money* before his bankruptcy, this cannot be followed<sup>t</sup>; and the principal must, in that case, come in under the commission like other creditors<sup>u</sup>. Though, even to *money*, if it is not blended with the general mass of the bankrupt's property, as, where it has been put into separate bags, and can be specifically ascertained, the owner of the goods will be entitled, in the same manner as to the goods themselves<sup>x</sup>.

<sup>r</sup> Exp. Murray, Co. B. L. 400.

<sup>s</sup> Ld. Ch. J. Lee in Scrimshire and Alderton, Str. 1182, Mr. J. Buller in Escot and Milward, Co. B. L. 400.

<sup>t</sup> Whitecomb and Jacob, Salk. 160.

<sup>u</sup> Exp. Dumas, 2 Vez. 1 Atk.

<sup>x</sup> Took and Hollingworth, 3 T. R. 215.

*Goods* in the possession of a factor, from the known nature of his employment, can *seldom* leave room for any question as to the purpose for which they are in his possession. But with respect to another species of property, namely *bills of exchange* or *notes*, the possession of these is more equivocal; for being generally looked upon as cash, and delivered or remitted to an agent or banker generally in that way, and upon a general account betwixt the parties, they will be considered in that light; and, as being blended with the general mass of his property, will in case of his becoming a bankrupt, pass by the assignment under the commission, *unless* they appear to have been *specifically appropriated* to some particular purpose. If specifically appropriated, they are then considered exactly as *goods* in the possession of a factor; and if the purpose for which they were appropriated has not been answered, the owner will be entitled to them against the assignees, if they remain in specie; or to the money received upon them by the assignees after the bankruptcy.

As to what will amount to a specific appropriation; this being very much a question of fact, and therefore depending upon the variety of circumstances in each particular case, it may be necessary to state the circumstances material to this point, in those cases which have occurred upon this subject.

A correspondent of the bankrupt, before his bankruptcy, drew bills on him and desired him to

Q

place



BOOK III.  
CHAP. V.  
Sect. I.

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place them to *a particular account* in the name of a third person, distinguished from their general account by *a particular letter*, and which the bankrupt wrote he would do. The correspondent also drew other bills on other persons *to answer the former bills*, and remitted the latter for that purpose to the bankrupt, with directions to place these *to the same account*. The former bills not being paid by the bankrupt were sent back protested, and paid by the correspondent, and the latter bills which had been remitted to answer them, remained at the time of the bankruptcy, in the possession of the bankrupt, unnegotiated. This was held <sup>x</sup> to be a specific appropriation.

And where a person having drawn bills upon the bankrupt, also remitted him two other bills which he wrote him were sent *to answer what the bankrupt had to pay* on the correspondent's account; this was held <sup>y</sup> sufficient evidence of an appropriation; and that the remittance could not be upon the *general* account, or to answer what was *due from* the correspondent, for the bankrupt was indebted to him.

In a case of bills remitted to a banker, after an account transmitted to his correspondent, on which the latter was indebted to him upon the balance, for bills accepted and then outstanding, which the latter had drawn upon the banker under an agree-

<sup>x</sup> Exp. Dumas, 2 Vez. 582.  
<sup>1</sup> Atk. 232.

<sup>y</sup> Exp. Ourself, Ambl. 297.

*ment to make remittances to answer the same when due*; the bills remitted to answer those acceptances which were not paid by the banker, but by the correspondent himself afterwards, were considered <sup>2</sup> as in the nature of goods in the possession of a factor; and therefore that they belonged to the correspondent, subject to the banker's lien for the balance due to him at the time of the bankruptcy: and that having been deposited by the bankrupt with another banker who had set them short in the bankrupt's book, they were the same as if still in the possession of the bankrupt.

An agreement being entered into by a trader to purchase of his correspondent all the light gold sent by the latter, at a certain price, and to accept bills at two months for the money due upon the sale; *And* to accept from time to time *other* bills drawn by the correspondent for his own convenience, *but that in such case* the latter should remit value to the amount of such acceptances, to answer together with the light gold for the different bills so drawn: the trader became a bankrupt, and his correspondent being at the time of the bankruptcy considerably indebted upon the balance of the account, but ignorant of an act of bankruptcy committed, sent a quantity of light gold and some bills *in order to enable the bankrupt to pay his acceptances for him when they should become due*. He afterwards himself paid the amount of the bankrupt's acceptances

<sup>2</sup> Zinck and Walker, Bl. 1154.

BOOK III  
CHAP. V.  
Sect. I.

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for him, to the holders, and claimed the gold and bills against the assignees. There were no other accounts betwixt the parties, but upon these dealings which had been carried on in the manner stated for some years. This was held<sup>a</sup> to be a specific appropriation, like the case of principal and factor; and the agreement was distinguished into different parts; of which, though the first was merely a contract for a bargain and sale (78), the latter part was considered as a contract, of which the effect was, that the bankrupt should become the banker of his correspondent, and accept his bills, the latter remitting value to the amount, in light gold and bills; and to which latter part of the contract, the former had no other relation than as incidentally ascertaining the rate at which the gold was to be taken.

From all that has been said above, and the review of these cases of specific appropriation, it is hardly necessary to add that the owner has no lien where bills are paid in upon a *general running account*<sup>b</sup>, and not for the purpose of opposing a bill on one side of the account to another on the other; and it may be laid down generally, in the clear and emphatical language used in a particular case<sup>c</sup>,

<sup>a</sup> Took and Hollingworth,  
5 T.R. 215. and S.C. in error,  
2 H. Bl. 301.

<sup>b</sup> Exp. Ourfell, Ambler 298.

<sup>c</sup> Bent and Puller, 5 T.R.  
494.

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(78) The effect of which, underwent considerable discussion, but which is not material in this place, and the judgement was not founded upon it in either court.

that



that to make a specific appropriation, there must be a bill pledged against a bill, or a *transaction* against a *transaction*.

BOOK III.  
CHAP. V.  
Sect. II.

## SECT. II.

*Effect of the Assignment considered with respect to the Time of the Act of Bankruptcy(79).*

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13 *Eliz. c. 7. s. 2. 11.*

1 *Ja. c. 15. s. 13, 14.*

21 *Ja. c. 19. s. 2. 4. 14.*

19 *Geo. 2. c. 32. s. 1.*

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From the moment of committing an act of bankruptcy, a trader is divested of all power of charging or disposing of his effects, or any part of them,  
to

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(79) The time of the act of bankruptcy, is a subject which may be said to belong to every possible question concerning the effect of the assignment, and has already occurred more than once in the preceding section, particularly in the cases of set-off. But as it also comes directly under consideration, 1. in cases concerning the effect of dispositions of property made *after* that time, whether by the bankrupt himself, or by other persons; 2. in cases where the act of bankruptcy *intervenes* between the commencement of certain transactions and their completion; and lastly, in such where property *comes to* the bankrupt *after-*  
wards,

BOOK III.  
CHAP. V.  
Sect. II.

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to the prejudice of his creditors; and when upon a commission being issued, he has been adjudged a bankrupt, the commissioners may assign every thing that he had in himself, or such interest as he might lawfully part with, at the time he became a bankrupt. They have no *property*, however, vested in themselves, but merely a *power* under the statutes, of ordering and disposing of it for the benefit of the creditors<sup>d</sup>. The *legal property* remains in the bankrupt himself, though so bound from the act of bankruptcy that it cannot be altered, until assignment by the commissioners<sup>e</sup>. When these have executed their power by assignment, the property is then vested in their assignees, by *relation* from the time of the act of bankruptcy, so as to avoid all alienations or dispositions of it made after that time. And where the act of bankruptcy is by lying two months in prison, the *relation* goes back

<sup>d</sup> Ventr. 360.    2 Jo. 197.    <sup>e</sup> Cary and Crisp, Salk. 108.  
<sup>1</sup> Atk. 96.

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*wards*, whether by descent or purchase; I thought it might be convenient to consider the effect of the assignment in all such cases, under one common head, as I have accordingly done in this section. In the next are contained those which relate to the effect of the assignment in cases of fraud; where the operation of the *fraud* is the *principal* question, without reference either to the particular kind of the property *as assignable or not* in itself, or to the *relation* of the act of bankruptcy, further than as this belongs to every question concerning the effect of the assignment.

to the original arrest, so as to avoid all mesne acts from that time, as if the arrest were in itself the act of bankruptcy.

BOOK III.  
CHAP. V.  
Sect. II.

This *relation*, though it may in particular instances operate with considerable hardship on other persons as well as the bankrupt, and is considered as the hardest case which the law of England admits, has been laid down as a *general* rule by the legislature, as the best means it is said, of securing creditors against such dispositions of their property by bankrupts, whether by their own acts, or under the authority of legal process at the suit of others, as after committing secret acts of bankruptcy, they might otherwise have but too much temptation as well as opportunity of making, to defeat other creditors of the equal distribution of their effects. This security it would have been difficult, perhaps, in any other way to obtain, with respect to transactions under such circumstances, in which, especially when complicated with legal proceedings, it might not always be easy to distinguish or ascertain the fraud; and the hardships of individual instances are thought to be compensated by the public advantage arising from the generality of the rule; while, at the same time, the exceptions, introduced by particular statutes, are supposed to confine its operation, as to the bankrupt, almost solely to fraudulent transactions, and as to other persons, only to the placing



them on a level with all the rest of the bankrupt's creditors <sup>f</sup>.

I. *In the case of dispositions of property, made  
After the act of bankruptcy.*

1. *By acts in pais.*

The assignment overreaches and avoids all dispositions of a bankrupt's property, made after the act of bankruptcy, whether by release or discharge of debts, payment of money, negotiation of bills or notes, sale or delivery of goods, conveyance by mortgage, or otherwise, &c.<sup>g</sup>

If lands are devised to a trader; or if an estate is settled upon him for life, and after intervening uses, remainder to himself in fee, with a power to change the uses; he cannot, upon becoming bankrupt, in the one case wave the devise<sup>h</sup>, or in the other revoke the uses<sup>i</sup>.

No lien upon the bankrupt's property, can be acquired after the act of bankruptcy<sup>k</sup>; and not even after the first arrest, in the case of lying two months in prison<sup>l</sup>.

<sup>f</sup> 2 Co. 25, 26. 1 Vez. 328.

Burr. 31. 37. Bl. Comm. 486.

<sup>g</sup> 2 Co. 25, 26. 2 Vern. 256.

Forr. 68. 1 Atk. 260. 1 Vez. 328.

Burr. 32. Copland and Stein,

8 T. R. 199.

<sup>h</sup> Good. 88.

<sup>i</sup> Lofft. 71.

<sup>k</sup> Exp. Bush, 7 Vin. 74. Ver-

non and Hankey, 2 T. R. —.

Falkner and Case, 2 T. R. 491.

Copland and Stein, 8 T. R. 199.

<sup>l</sup> Exp. Lee, 2 Vez. J. 285.

By the law, as it stood upon the statute of Eliz. there was no distinction as to dispositions of property after an act of bankruptcy, between such as were made for a valuable consideration, or the contrary; or as to whether the party had or had not any knowledge of an act of bankruptcy being committed; but a creditor to whom money had been paid or goods delivered, though in satisfaction of a just debt, and without notice, or a debtor of the bankrupt himself, paying him under the like circumstances, were liable respectively, the one to refund what he had received, and the other to pay the debt over again to the assignees<sup>m</sup>. Neither was there any limitation as to lapse of time, against the effect of this *relation*; and though these inconveniencies have been, to a certain degree, remedied by the legislature since, yet the general rule still prevails in all cases, not expressly excepted by positive statute<sup>n</sup>, whatever may be the hardship in the particular instance; insomuch that a bankrupt cannot apply any part of his effects, even for the necessary maintenance of himself and his family, without the consent of his assignees<sup>o</sup>. The excepted cases are, 1. *the receipt of debts without notice*; 2. *payments in the course of trade*; and, 3. *purchasers where no commission is sued within five years*.

<sup>m</sup> Ut supra.<sup>n</sup> 1 Bl. 829.<sup>o</sup> Thompson and Council, 1 T. R. 157.*Receipts*

*Receipt of debts without notice, and Payments  
in the course of trade.*

By the 1st of Ja. no debtor of a bankrupt shall be endangered by the payment of his debt *bonâ fide*, before such time as he shall understand or know that he is become a bankrupt: and by the 19 Geo. 2. no creditor for goods sold to the bankrupt, or for bills of exchange drawn, negotiated, or accepted by him in the usual and ordinary course of trade, shall be liable to refund to the assignees, any money which before *the issuing of the commission*, was *bonâ fide* and in the usual and ordinary course of trade, *received* by such creditor before he shall know, understand, or have notice, that he is become a bankrupt, or in insolvent circumstances.

Notice of the bankruptcy, within these statutes, means notice merely of the circumstances or facts; and the party will not be permitted to say he did not understand the legal consequences of them, or that he did not know that in law they amounted to an act of bankruptcy. His knowledge of the facts is sufficient; he must know the law, and is bound by the consequences<sup>p</sup>. And the 19 Geo. 2. seems expressly to carry it further than notice of a strict legal act of bankruptcy, for the words are, "before he shall know, &c. that he is become bankrupt, *or in insolvent circumstances*."

<sup>p</sup> Vernon and Hankey, 2 T. R. 113.



Payments made without notice are protected, because an act of bankruptcy may be so secret as to be impossible to be known; but no payments are protected, if made *after a commission issued* (80), though the party should not actually know of it: a commission being a public act, of which all are bound to take notice<sup>1</sup>. The statute of the 19 Geo. 2. relates expressly only to payments made before the suing forth of the commission.

BOOK III.  
CHAP. V.  
Sect. II.

Notice, however, alone is not sufficient to avoid payments made to a bankrupt; they must also be voluntary<sup>2</sup>. They will be good though made with notice, if the party is compelled to pay by suit, or a judgement at law, unless it is collusive<sup>3</sup>. And it seems that the party indebted to a bankrupt, and privy to a secret act of bankruptcy committed, cannot, in an action against him by the bankrupt, take advantage of it so as to avoid payment, after a length of time, and no commission sued out, or any steps taken to obtain one<sup>4</sup>.

In the case of lying two months in prison upon an arrest, the relation will avoid a payment made with notice of the bankrupt's being in prison, though at the

<sup>1</sup> 2 Co. 26. Hitchcock and Sedgewick, 2 Vern. 156. Forr. 70.

<sup>2</sup> 1 Vern. 94. Foster and Allanson. 2 T. R. 479.

<sup>3</sup> S. C. ibid. Prin and Beale, 3 Keb. 230. Pym and Benson,

Freem. 349. Holmes and Wintonington, and Calvert and Lingard, 2 H. Bl. 334.

<sup>4</sup> Foster and Allanson, 2 T. R. and see Andrews and Spicer, 3 Keb. 616.

(80) See below, p. 238, 9. (Wilkins and Casey.)

time

BOOK III.  
CHAP. V.  
SECT. II.

time of the notice, the act of bankruptcy is not complete, the two months not being expired<sup>u</sup> (81).

*Bankers* are exactly in the same situation in respect of these statutes, as all other persons being creditors or debtors respectively of a bankrupt. If a merchant pay money into a banker's hands, the latter is a *debtor* for the amount as much as any other person who receives the money of another. He is not bound to answer the bankrupt's draughts after notice of the act of bankruptcy. On the contrary, he is bound to know that the money in his hands is from that time the money of the assignees, for which he is answerable to them only; and no payments made by him, either to the bankrupt himself, or to creditors upon the bankrupt's draughts, will, after such notice, be protected by the statute<sup>x</sup>.

By the 19 Geo. 2. not only the *payment* must be in the ordinary course of trade, but the *debt*

<sup>u</sup> King and Leith, 2 T.R. 141.

R. 113. Hankey and Vernon,

<sup>x</sup> Vernon and Hankey, 1 T.

3 Bro. 313.

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(81) The court considered the payment in the case here referred to, as being not a *bona fide* payment. *Qu.* Whether upon the ground of notice of the *imprisonment* merely? For there were other circumstances of *mala fides* in the case. If notice of the imprisonment merely, were to be held sufficient to avoid payments, how could a trader, when nobody could pay *him* in that situation, ever avoid bankruptcy by paying his *own* debts? But see Langston and Boylston, 2 Vez. jun. 101.

must be in respect of *goods sold* to the bankrupt, or of *bills* drawn, &c. by him in the ordinary course of trade.

BOOK III.  
CHAP. V.  
SECT. II.

A payment, therefore, of money to a carrier, for the *carriage* of goods<sup>y</sup> has been held not to be within the statute. Nor payment of a bill upon which the holder, when it fell due, had given the bankrupt time, upon condition of being allowed interest<sup>z</sup>; this being considered as a *loan of money at interest*, and the payment therefore not a payment in the ordinary course of trade. So where the creditor being a ship owner, had obtained a verdict against the bankrupt for *freight*; and instead of proceeding to judgement and execution, gave the bankrupt time, and took a bill upon a third person for the amount, which was afterwards paid, this was held not to be within the protection of the statute<sup>a</sup>. But where a creditor of the bankrupt before the bankruptcy, directed the bankrupt to invest the money in stock, and having been informed that the stock was bought, and received a copy of a broker's note to that effect, he *borrowed* a sum of money of the bankrupt, which he repaid with interest after a secret act of bankruptcy. The stock was not bought, and the creditor applied to prove his whole debt under the commission, which was resisted upon

<sup>y</sup> Bradley and Clarke, 5 T. R.

<sup>a</sup> Pinkerton and Marshall, 2 H. Bl. 334.

197.

<sup>z</sup> Vernon and Hall, 2 T. R.

648.

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BOOK III.  
CHAP. V.  
Sect. II.

the grounds that the money *lent* must be deducted as a *payment made by the bankrupt*, and that the repayment, being after the act of bankruptcy, was a nullity: but the proof was allowed<sup>b</sup>, the transaction being considered as *no payment by the bankrupt*, but a loan, which being repaid, though after a secret act of bankruptcy, it was to be considered as if the money had never been lent.

The 19 Geo. 2. is not only specific as to the *ground* of the debt, but seems also to relate only to payments in *money*; and though Ld. Hardwicke held<sup>c</sup> that there is no difference between an actual payment of money, in satisfaction of a debt, and the delivery and indorsement of a bill of exchange for it, considering this only as a *medium* of payment, yet he added, "provided the *money* was received on it before the commission issued (82)."

The statute of Ja. with respect to payments made by a debtor to a bankrupt, contains no restriction as to the ground of the debt, or the medium of payment: and it has been held<sup>d</sup> that the statute

<sup>b</sup> Exp. Congalton, 3 Bro. 47.

<sup>d</sup> Wilkins and Casey, 7 T.R.

<sup>c</sup> Hawkins and Penfold, 2  
Vez. 550.

711.

(82) By this might be meant only that the *creditor* is not bound by it as a payment till the money is actually received upon it; and not that he may not *avail* himself of it, as against the assignees if he chuses; though the money may not be payable till after the commission issued.

The words of the statute, however, are explicitly, "*any money received.*"

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ought to be liberally construed, and that a payment to a bankrupt by the delivery of goods, or a bill of exchange, would be the same as a payment of money.

BOOK III.  
CHAP. V.  
Sect. II.

And upon this ground, where a debtor to a bankrupt, having after a secret act of bankruptcy, to which he was not privy, accepted bills to the amount of his debt, and having delivered them to the bankrupt, paid the money upon his acceptances, to a third person the holder of them; though after a commission had issued, it was held a good payment<sup>e</sup> (83).

*Purchasers, where no commission is sued  
within Five years.*

There was no limitation in respect of time, for the security of persons claiming under a bankrupt by any act done by him after his bankruptcy, until the statute of the 21 Ja.; which provides that no purchaser for a valuable consideration shall be impeached, unless the commission is sued forth within *five years* after the person became a bankrupt.

This statute protects only purchasers *bonâ fide* without notice of the act of bankruptcy<sup>f</sup>, for

<sup>e</sup> S. C.

<sup>f</sup> Read and Ward, 7 Vin. 119.

(83) I am not aware of any other case in which a voluntary payment, either to or by a bankrupt, made after a commission issued, has ever been sustained.

though

BOOK III  
CHAP. V.  
Sect. II.

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though it does not mention notice, yet as all the statutes are to be construed together and considered as one, this clause is to be compared with that in the 13 Eliz. c. 7. f. 12. which avoids purchases before the bankruptcy, if made with notice that the conveyance was to defraud creditors.

Where the act of bankruptcy is by the execution of a fraudulent deed, notice of the deed is not sufficient without notice also of the fraudulent intent of the deed<sup>g</sup>.

Equitable purchasers are equally within the protection of the statute, as purchasers by actual conveyance at law<sup>h</sup>.

The few other points, that have been determined upon this subject, turn mostly upon the effect of the relation of the act of bankruptcy where *several* acts have been committed at *different* times. It is held<sup>i</sup> that a *subsequent* act of bankruptcy cannot defeat the interest which the creditors acquire in the bankrupt's estate by a *prior* act; and therefore that if after one act, another is committed by suffering a fraudulent outlawry, upon which the crown makes a lease of the profits of the bankrupt's lands, and a grant of his chattels, the outlawry lease, &c. will not prejudice the creditors, if a commission is sued within the five years: but if it is not, the assignee, for a valuable consideration, of the

<sup>g</sup> Ibid.

<sup>h</sup> Ibid.

<sup>i</sup> Pain and Teap, Salk. 108.



king's lease, is a purchaser within the protection of the statute.

BOOK III.  
CHAP. V.  
SECT. II.

The proviso of the statute is not, that a commission must be sued within five years, after *first* becoming a bankrupt, but only, after he shall become a bankrupt, generally <sup>k</sup>: and therefore it is held, that if *after* several acts of bankruptcy, sale is made by the bankrupt, and a commission issues within five years from the *last* act, the sale is avoided <sup>l</sup>. But one who purchases after an act of bankruptcy, will not be hurt by any other act, *subsequent* to the sale, if no commission issue within five years from the act *preceding* the sale, though within five years from the subsequent act <sup>m</sup>. An act of bankruptcy, to avoid a sale, must be within five years before the commission, and must also be before the sale <sup>n</sup>.

## 2. By acts of Law.

The relation of the assignment, over-reaches not only acts in pais, but also legal acts and acts on record <sup>o</sup>. An *award* made after a secret act of bankruptcy, and confirmed by the court in an adverse suit, has been held not to be avoided by the assignment under a commission issued afterwards <sup>p</sup>; but it seems to be doubtful whether the decree in

<sup>k</sup> Spencer and Vanacre, 1 Keb. 722.

<sup>l</sup> Jolliffe and Horne, 1 Keb. 11.

<sup>m</sup> Spencer and Vanacre, 1 Keb. 722. Bradford and Blood-

worth, ib. 11. 1 Lev. 13.

<sup>n</sup> 1 Lev. ibid.

<sup>o</sup> 1 Vcz. 328. Burr. 32.

<sup>p</sup> Whitacre and Paulin, 2 Vern. 229.

BOOK III.  
CHAP. V.  
Sect. II.

this case was not reversed upon a rehearing<sup>1</sup>. But the legal acts particularly noticed by the statute, are

*Judgements, Executions, &c.*

All judgments, statutes, or recognizances, whether affecting lands or goods<sup>2</sup>, attachments by the custom of London or any other place, obtained or made after an act of bankruptcy; and all executions or extents not served and executed till after that time, though proceeding upon judgments, &c. obtained before it, are avoided as against the assignees<sup>3</sup>.

The statute is express that the execution or extent must be served and executed before the bankruptcy. Though the goods are said to be bound by the delivery of the writ (as formerly they were by the teste), that is only as between the parties to the judgment on which the execution issues, so that the bankrupt himself cannot dispose of them after that time; but the commissioners may, unless the writ is actually executed; and delivery of the writ may be a serving, but it is not an execution of it<sup>4</sup>. But the assignment will not prevail against an extent, though the *liberate* should not be brought or the goods delivered upon it till after the bankruptcy, if the goods were appraised

<sup>1</sup> S. C. *ibid.*

<sup>2</sup> Newland and —, 1 P. W.  
92. Orlebar and Fletcher, *ib.*  
737.

<sup>3</sup> 21 Ja. c. 19. s. 9. 12 Mod.  
446. Str. 981. 1 Vez. 328. Burr.  
32 Bl. 68.

<sup>4</sup> Philips and Thomson, 3 Lev.  
and

and the writ returned before<sup>u</sup>; for the statute comprehends only judgments, &c. whereof there is no execution or extent served and executed, but here the *extent* is served, executed, and returned before the bankruptcy<sup>x</sup>.

BOOK III.  
CHAP. V.  
Sect. II.

Where the act of bankruptcy is by lying two months in prison, any execution executed after the first arrest, though before the act of bankruptcy is complete by the expiration of the two months, is avoided by the relation<sup>z</sup> (83).

*Attachments of property Out of England.*

By the laws of most countries, personal property is subject to the law which governs the person of the owner; and as the owner in this country may dispose of his personal property abroad, as well as of that here, and by the law of England

<sup>u</sup> Audley and Halsey, Cro. Car. 148.

<sup>z</sup> Coppendale and Bridgen, Burr. 814.

<sup>x</sup> S. C. W. Jo. 203.

(83) On comparing the operation of the statute of Ja. with respect to executions, with that of 19 Geo. 2. with respect to payments, it appears that the same creditor who might, without notice of the bankruptcy, safely receive his debt, either by the voluntary payment of the bankrupt, or a compulsory one, as by instituting a suit, but stopping short of execution, would lose it by proceeding to execution, that is, if he availed himself of the remedy the law holds out to him to render his suit effectual.



BOOK III.  
CHAP. V.  
Sect. II.

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every thing he can so dispose of himself at the time of his bankruptcy is divested out of him and transferred to his assignees, so therefore the assignment, it is said, under a commission against him here, vests in his assignees, all his debts and other personal effects in a foreign country, in all cases where there is no positive law of that country to prevent it. The bankrupt statutes of Eliz. and Ja. are supposed even to have had property of this kind in contemplation at the time they were passed : the words of the former, which enable the commissioners to dispose of " the bankrupt's money, &c. and debts *wheresoever* they may be found or known," being sufficiently large to include it ; and the statutes of James against priorities obtained by foreign attachment *according to the custom of London*, using these words, it is said, only by way of instance or illustration, but really meaning all foreign attachments at home or abroad, made " *in such manner as is warranted by the custom of London.*" Personal property then, by the law of nations, following the person, and that property being by the law of England vested in the assignees from the time of the bankruptcy, it is held that to permit a creditor, subject to the law of England, to obtain a priority against the assignees by attaching the effects abroad after the bankruptcy, would be to permit a direct contravention of that very law to which the party owes submission and allegiance.

And

And though the judgment of a foreign court, obtained by a creditor under such circumstances, may be binding between the parties to the suit, yet that a recovery so obtained, considered otherwise than as a recovery to the use of the assignees, would be in violation of an English act of parliament; and that such recovery ought, therefore, to be taken to be for their use, and upon which they may have an action as for money had and received; the ground of which, it is said, is collateral to and even in affirmance of the judgment.

Upon these grounds it has been determined<sup>a</sup>, that if a creditor, having *notice* of the bankruptcy, and all the parties being *resident* in England, and the *debt* contracted in it, avails himself of the *process* of the law of England (as by making an affidavit of his debt), to proceed by attachment against the bankrupt's effects in another country either subject to or independent of the crown of Great Britain, and obtains judgment and execution; he cannot retain it against the assignees.

To the general proposition, however, of the assignment here passing the effects in a foreign country, so as to give a preferable title to the assignees, it is admitted there may be exceptions,

<sup>a</sup> Hunter and Potts, 4 T.R.  
182. Sill and Worwick, 1 H. Bl.  
665. Philips and Hunter, 2 H.  
Bl. 402. Dissent. Ld. Ch. J. Eyre.

—Contra, Waring & Knight,  
Co. B. L. 307. Cleve and Mills,  
ib. 303. and Mawdesley and  
Parke, cited 2 H. Bl. 630.

by the particular law of the country ; and that a creditor in that country obtaining payment of his debt, and afterwards coming to this country, would not be liable to refund to the assignees here, if the law of that country preferred him to the assignees <sup>b</sup>.

The courts in *England*, it is true, recognise the laws of other countries, in giving effect to an assignment, made under a law in those countries analogous to our bankrupt law, against a creditor here who, after such assignment (84), recovers upon a foreign attachment here, a debt due to the bankrupt in this country <sup>c</sup>.

But with respect to the recognition by *other* countries of *our* bankrupt laws, so far as to give effect to an assignment under a commission against a bankrupt here, in preference to an attachment made in their own courts by an English creditor, I find no express determination, except in *Ireland*. There, it has been solemnly determined, that a creditor in England, proceeding by attachment in Ireland, after the bankruptcy of a person in this country, to recover a debt due to the bankrupt in

<sup>b</sup> Sill and Worfwick,

131. Jollett and Deponthieu.

<sup>c</sup> Solomons and Rofs, 1 H. Bl.

ib. 132.

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(84) By the laws of Holland (as appeared *in evidence* in one of the cases above referred to), the *relation* is not as in England, to the time of the act of bankruptcy, but only to that of the appointment of the curators or assignees.

that,



that, is not entitled to retain it as against the assignees here<sup>d</sup> (85).

BOOK III.  
CHAP. V.  
Sect. II.

Though

<sup>d</sup> Neale and Cottingham, 1 H. Bl. 132.

(85) The court of Session in *Scotland*, though they give effect to the assignment under the commission in England, so far as to allow the assignee to *sue* in Scotland, considering it as equivalent to an assignment by the bankrupt himself, yet seem to consider the question, in cases of *competition* with third persons, as being to be decided by the locality of the *contract*, or of the *subject* of the *debt*, and not by the *lex domicilii* of the *person* to whom the debt is due. In Wilson's case, (Bradshaw and Ross, assignees of Wilson, against Fairholme and others, Coll. of Decis. Vol. I. p. 198.) who was a native of Scotland, but resident in England, the debts which were attached in Scotland (after the act of bankruptcy), were constituted by bonds granted and made payable in England. The assignees under the commission contended that they ought to follow the *lex loci contractus*, and that the debts being contracted in *England*, the bonds made in the *English* form, payable in *England*, and the creditor (*i. e.* the bankrupt) resident in *England*, they were in every view *English* debts. The attaching creditors, on the other hand, argued, that though the solemnities of a contract may be governed by the *lex loci contractus*, yet legal diligence on such contracts must be regulated by the law of the country to whose jurisdiction the debtor is subject, and in which the diligence is used. That the commission might supersede diligence from the courts of England, against debts within the jurisdiction of those courts, but not that against those within the jurisdiction of another country, and that the jurisdiction of the courts in Scotland extended both to Captain Wilson and the bonds.—The court preferred the title of the assignees, but expressly upon the ground, that the debts in question being debts contracted after the *English* form, or made payable in *England*, were to be considered as *English* debts.

Though the English *creditor* who obtains payment by attaching the effects abroad after the bankruptcy, is liable to the assignees, yet the gar-

In a subsequent case (Crawford and others against Brown and Crow, assignees of Dunlop, Coll. of Decis. Vol. II. p. 319), the circumstances of the debts being just reversed, the court, adhering to the same principle, decided *against* the assignees. Dunlop, a native of Scotland, but occasionally resident in England, became a bankrupt in England, and a commission issued. Before the commission, but after the act of bankruptcy, the plaintiffs attached some debts due to Dunlop in Scotland. In a competition between them and the assignees, the latter relied upon Wilson's case; and contended that the legal assignment under the commission had the same effect as an assignment by the creditor (the bankrupt) himself. It was answered, that the debts in question being none of them contracted, or payable in *England*, but in *Scotland*, were subject to the jurisdiction of the courts of Scotland and no other: That an English *statute* could have no effect beyond its own jurisdiction, any more than the retrospect of the act 1696 (*relation* of the bankruptcy under a particular act of the Scotch parliament), would be effectual in England or Holland, or the retrospect of the ordinances in France, would in Scotland or England: That in Wilson's case, the title of the assignees was preferred only in respect of *English* debts, but that the judgment was the contrary way as to the *Scotch* debts; and that this had been so determined also in the case of Ogilvie against the creditors of Aberdeen, 1747. The assignees in reply insisted, that the debts in question being contracted in Scotland, and made payable there, made no difference; that *mobilia sequuntur personam*, and therefore must be governed by the statutes of England, where the creditor (the bankrupt) resided when the commission was taken out.—The court preferred the title of the arresters of the debts due in Scotland, to that of the assignees.

*nishee* himself, of whom the debt has been so recovered, is not compellable to pay it over again. By the *bankruptcy*, the debt is so far vested in the assignees, that if *not* attached, the debtor is answerable immediately to *them*; but if before recovery by them, it is attached *bonâ fide* by regular process according to the law of the place, the assignees cannot recover it against the *garnishee* <sup>e</sup>.

To the rule of acts of law avoided by the assignment, there is one distinguished case of exception—that of

*Extents of the Crown.*

An *extent* for the crown, which binds the property of him against whom it issues, from the *teste* of the writ <sup>f</sup>, will bind the effects of a bankrupt, for the debt of the crown, if *tested* at any time before actual assignment; because till then, the legal property is not out of the bankrupt<sup>g</sup>: and though in the case of a subject, the assignment, when executed, vests the property in the assignees, by relation, from the time of the act of bankruptcy, so that no lien can be acquired in the mean time, yet relations, which are but fictions in law, do not operate to prejudice the crown <sup>h</sup>.

<sup>e</sup> Le Chevalier and Lynch, Dougl. 170.

<sup>f</sup> Stringfellow's case, Dyer 67.

<sup>g</sup> Queen and Arnold, 7 Vin. 104. 2 Vez. 295.

<sup>h</sup> S. r. 982. 4 T. R. 411.



BOOK III.  
CHAP. V.  
Sect. II.

An extent not tested till after an actual assignment, comes too late, because by assignment the property is altered and transferred to third persons<sup>1</sup>.

If an extent is tested the same day the assignment is executed, the crown is preferred<sup>2</sup>.

An extent tested before the *fiat* or award of it by the court, is irregular; and if the *fiat* is subsequent to the assignment, the assignment will prevail against the extent tested before the *fiat*<sup>1</sup>.

A *seizure* under *other* process, for a debt to the crown, as under a warrant of commissioners of the land-tax for land-tax money in the hands of the collector, though the warrant itself is not equal to an extent so as to bind from the *date*, creates a lien before actual assignment, upon the same grounds, that till assignment, the *property* is not out of the debtor, and that relations cannot bind the crown<sup>m</sup>. And the lien is complete by the seizure, though the actual sale should not be till after the assignment<sup>n</sup>.

In certain cases, the *excise acts* charge the subjects of the particular duty, the materials, and utensils, into whose hands soever or by whatever title or conveyance they come, with all the duties unpaid; not only with those unpaid on account of specific effects in possession, but with all previous arrears due for former effects. Under those acts,

<sup>1</sup> Str. 982. <sup>2</sup> Vez. 295.

<sup>2</sup> King and Crump, <sup>2</sup> Sho. 481. Park. 126. <sup>3</sup> Vez. 295.

<sup>1</sup> King and Man, Str. 749.

<sup>m</sup> Bialley and Dawson, Str. 978.

<sup>n</sup> Ibid.

therefore,

therefore, the crown is held to have such a lien for all such duties unpaid at the time of the bankruptcy, that the effects remain liable even after actual assignment; and though this should be made without notice of the king's debt, and before an extent or other process issued on behalf of the crown<sup>o</sup>.

BOOK III.  
CHAP. V.  
SECT. II.

And in the case of a forfeiture of double duties, for being in arrears on account of the single duties; all such effects as, at the time of the bankruptcy, were chargeable, under the particular excise act, with the double duties, will continue to be so in the hands of the assignees; though the conviction and warrant of distress upon it for the double duties, are subsequent both to the bankruptcy and to the assignment; the assignees standing exactly in the place of the bankrupt as to this sort of lien, and taking the property subject to all the same charges<sup>p</sup>.

A warrant to seize "the bankrupt's goods and chattels," upon a conviction under the excise laws for a forfeiture incurred by concealing soap, *after a provisional assignment* executed, was held to be bad<sup>q</sup>: 1. because they were not then the goods of the bankrupt; 2. because the statutes do not make the goods *generally* liable, but only the specific sub-

<sup>o</sup> Cases of Malt Duties, Att'y Genl and Senior, Dougl. 416, King and Fowler, id.

<sup>p</sup> Case of Duties upon Candles, Stracy and Hulke, Dougl. 411.

<sup>q</sup> Austin and Whitehead, 6 T. R. 436.

BOOK III.  
CHAP. V.  
Sect. II.

jects of the duties, with the materials and utensils, &c. (86).

When the king's debt has been satisfied ; as by a surety of one who becomes bankrupt, *Qu.* Whether an extent in aid issued after the bankruptcy, binds as in the case of a debt due actually to the crown<sup>r</sup> (87).

II. *In the case of dispositions of property, where the bankruptcy intervenes in some part of the transaction.*

Though a trader cannot, after committing an act of bankruptcy, dispose of his effects, or enter into any contract that will be binding with respect to them, yet down to the moment of the act of bankruptcy, he has the entire dominion over all his property as much as at any time antecedent ; and any disposition of it, whether by his own act or by act of law, or any contract entered into with respect to it, will be valid if made *without fraud*, and *completed* before the bankruptcy<sup>\*</sup>. But if the act by which the property is sought to be transferred,

<sup>r</sup> King and Pixley, Bunb.

<sup>\*</sup> Burr. 2239.

202. acc. Jeffrys and Williams,

Skinn. 162. cont.

(86) The court deciding upon the form of the warrant, afforded no occasion of determining whether the lien under these acts extends to penalties as well as duties ; but the words of the acts *seem* equally to extend to them.

(87) As to *fraudulent* extents, see below, title *Effect of the Assignment in cases of Fraud*.

is



is not *completed* before that time, the intervening act of bankruptcy will generally avoid it<sup>1</sup>. A question, however, has frequently occurred, how far under the particular circumstances an act shall be considered as complete, so as to vest the property absolutely before the bankruptcy.

BOOK III.  
CHAP. V.  
SECT. II.

It has been laid down generally<sup>2</sup>, that where the owner of goods or lands cannot by his own act control a gift or a charge which he has made, it will not be defeated by his becoming a bankrupt. So, if lands are bargained and sold before the bankruptcy, the commissioners cannot assign them, though the deed is not inrolled till after: and the estate vests in the bargainee, by the bargain and sale, by relation from the *execution*, and not by the *inrollment*<sup>3</sup>.

If goods or lands are given on a condition precedent, and the donor becomes bankrupt, and afterwards the condition is performed, this will defeat the power of the commissioners<sup>4</sup>: or, if one makes a lease for years, on a condition to be fee, and before the condition performed, becomes bankrupt, and the condition is performed afterwards<sup>5</sup>.

A creditor of the bankrupt's upon a note of hand, insisting upon payment, gave up the note, upon receiving an order, upon an intended purchaser of some property of the bankrupt's, directing him to pay the amount out of the purchase

money;

<sup>1</sup> Burr. 2239. Cowp. 123.5.

<sup>2</sup> S. C. ib.

<sup>3</sup> Audley and Halsey, W. Jones 203.

<sup>4</sup> S. C. ib.

<sup>5</sup> S. C. ib.

BOOK III.  
CHAP. V.  
Sect. II.

money; who agreed to do so, and that when the conveyances were prepared and the purchase money to be paid, the creditor should receive notice to attend. The creditor, receiving notice, attended accordingly; but before the business could be gone through, the bankrupt leaving the room, was arrested, and a commission afterwards issued. This was held<sup>a</sup> to be not an inchoate transaction, but that the order fixed the money the moment it was shewn to the purchaser.

But the principal cases in which questions of this kind have arisen, are, 1. where the act that is done is merely that of *conveying the legal estate*; 2. where the act is complete on one side before the bankruptcy, but the *assent* upon the other is *subsequent* to it; and lastly, where property that has been consigned, is *stopped in transitu*, that is, before it comes into the possession of the party.

*Acts done merely to convey the  
Legal estate.*

If a trader, for a valuable consideration, before his bankruptcy, assigns goods at sea, and delivers the policy of insurance, with the letters of advice, and at the same time gives an undertaking to indorse and deliver over the bill of lading as soon as it arrives; such indorsement will be good against the assignees, although between the assignment and indorsement, an act of bankruptcy intervenes<sup>b</sup>.

<sup>a</sup> Yeates and Groves, 1 Vez.  
L. 280.

<sup>b</sup> Lempriere and Pasley, 2 T.  
R. 485.

Or if before an act of bankruptcy, he delivers over a bill of exchange, for a valuable consideration, but forgets to indorse it, he may indorse it after the bankruptcy<sup>c</sup>.

BOOK III.  
CHAP. V.  
Sect. II.

Though the bankrupt himself, in such cases, has the legal estate in him at the time of his bankruptcy, the real and beneficial interest is in the creditor. The bankrupt is bound to make the indorsement, and the assignees would be subject to the same equity.

Even without indorsement or other regular assignment, if the writings which are the *documents* of the right to the property, are delivered before the bankruptcy, and the property is in a situation or of a kind not to admit of a specific delivery, as goods at sea or choses in action; the creditor would have an equitable lien upon it, which would be available against the assignees<sup>d</sup>.

*Property delivered before, but not Accepted  
till After the bankruptcy.*

In contracts for the transfer of property, the *assent* of the alienee, is, as in all cases of contract, essential to their final completion. In cases of sale, where goods are delivered immediately to the vendee, the contract, by the delivery on the one hand and acceptance on the other, takes effect at

<sup>c</sup> Smith and Pickering,  
Peake 30.

<sup>d</sup> Brown and Heathcote, 1  
Atk. 160.

once,



BOOK III.  
CHAP. V.  
Sect. II.

once, being complete in both its parts at one and the same time. But where the goods are not delivered immediately to the vendee, but to a third person as a trustee for his use; there, although by such delivery to his use, the property is said to vest in him immediately, and even before notice to him or agreement on his part<sup>e</sup>: yet the contract is not finally complete, but remains open, and subject to a disagreement afterwards; on the part of the *vendee* in all cases, and subject also on the part of the *vendor* to be revoked or countermanded at any time before actual delivery to and assent by the *vendee*, in case the delivery to his use is made *without any precedent consideration*; as where goods are not paid for beforehand, or not delivered in satisfaction of a debt. In such case, an act of bankruptcy in the vendor, *intervening* before actual delivery to or assent of the vendee, operates as a countermand or revocation by the vendor, and the property will vest in his assignees'. But if the delivery is made *upon a precedent consideration*, the property is thereby transferred absolutely to the person to whose use the delivery is; so that the assignees of the vendor cannot take the goods back, though an act of bankruptcy intervenes before an actual assent or delivery: for though the

<sup>e</sup> 3 Co. Butler and Baker's case.

<sup>f</sup> Alderson and Temple, Burr.

2239. Harman and Fisher, Cowp. 125.

vendee

vendee *might* dissent, in which case the property would be considered either as revesting in the original owner, or as never having been out of him, yet the assent will be *intended* in the case of a precedent consideration, and the contract will, for the ends of justice, be *presumed* complete, unless an actual dissent appears <sup>g</sup>.

BOOK III.  
CHAP. V.  
SECT. II.

Where, therefore, two traders being partners and residing in the country, received before their bankruptcy a quantity of goods from their correspondents in London, and upon finding their affairs in a declining condition, sent the same goods to a third person, with orders to deliver them back to their correspondents, and shortly after becoming bankrupts, wrote to their correspondents to inform them of the state of their affairs, and to give them notice of what they had done with the goods, who as soon as possible signified their consent to take them again: it was held, that the delivery in this case, being founded upon a good consideration, (the bankrupts being indebted to their correspondents to more than the value of the goods in question), was not countermandable; and therefore that the act of bankruptcy intervening before any assent on the part of their correspondents, did not prevent the property from vesting in these absolutely, and the court said they would presume their assent, it being for their benefit <sup>h</sup>.

<sup>g</sup> Burr. ib.

<sup>h</sup> Atkin and Barwick, Str.  
165.

The determination in this case has been since repeatedly confirmed, though upon somewhat different grounds; namely, that the property never in fact vested in the *bankrupts*, they having refused to *accept* the goods, and returned them<sup>i</sup>, and that all parties interested, having agreed to rescind the contract, put an end to the sale as if it had never taken place<sup>k</sup>.

So where goods were sold and delivered to an agent of the vendee, having a general authority to make purchases for him, but before the transaction took place, the principal knowing himself to be insolvent, sent an order to his agent to make no more purchases, and if he had made any, to let the persons have their goods back again, upon the receipt of which order, the agent applied to the vendors to take their goods again, and who agreed to do so: in such a case, though the property was apparently divested out of the vendors at the time of the sale, according to the opinion the parties then had of the transaction, it was not so in reality, because the delivery to the agent of the vendee was controlled by the prior order of the principal, and it was competent for the parties by their mutual agreement to rescind the contract as if it had never existed<sup>l</sup> (87).

But

<sup>i</sup> Harman and Fisher, Cowp. 125.

<sup>k</sup> 5 T. R. 214. 6 T. R. 856.  
<sup>l</sup> Salte and Field, 5 T. R. 212.

(87) And it was held (*ibid.*) that such acts by an agent done *bona fide* and in pursuance of his authority, before he knew



But if goods are actually delivered and *accepted* before the bankruptcy, the parties cannot, afterwards, in contemplation of an insolvency, put an end to it, as if it had never taken effect: for by the delivery and acceptance the contract is completed, and cannot be rescinded by any *subsequent* act, to the prejudice of *third* persons<sup>m</sup>.

BOOK III.  
CHAP. V.  
Sect. II.

If a vendor, after contracting to sell *for ready money*, delivers the goods without demanding it; an act of bankruptcy in the vendee, intervening before the delivery, will not avoid the sale by the non-payment of the money; for the sale is made complete by this act of the vendor himself, which vests the property in the vendee, as a complete sale *ab initio* without ready money<sup>n</sup>.

*Property stopped in transitu.*

Where the *vendee* of goods becomes insolvent or a bankrupt *before* they have been *paid for*, it has always been considered as a great hardship, even if they have been actually delivered before the bankruptcy, that the vendor should be obliged to

<sup>m</sup> Barnes and Freeland, 5 T. R. 80.

<sup>n</sup> Haswell and Hunt, cited 5 T. R. 251.

of its being recalled, were good; and that the principal in such a case could not avoid them, if they were to his disadvantage, though he might consent to avoid those which were for his benefit.

BOOK III.  
CHAP. V.  
Sect. II.

give up all claim to the goods, and come in only as a creditor under the commission; and for which it is said no substantial reason can be alleged, but that of the general credit which the bankrupt is enabled to gain by being permitted to have goods in his custody\*. But when goods are not delivered immediately to the vendee, but sent or consigned from a distant place, and delivered in the first instance to a third person, as a carrier or master of a vessel, to be carried and delivered to the consignee; in that case, if the goods have not been paid for before-hand, and the consignee becomes insolvent or a bankrupt before the arrival and delivery into his possession, it has been determined in a multitude of cases<sup>p</sup>, that the consignor may stop them while they are yet *in transitu*; and if he can obtain possession of them again by any means short of violence or fraud before actual delivery, he will be entitled to retain them against the consignee or his assignees.

This is perfectly settled as between *consignor* and *consignee*; but as between the consignor and *third* persons, in cases where *bills of lading* having been made out and transmitted to the consignee, are assigned by him to a third person *for a valuable consideration without notice* of the goods not having

\* 1 Atk. 249.

<sup>p</sup> Wiseman and Vandeput,  
2 Vern. 203. Exp. Clare, Co. B.  
L. 475. Exp. Frank, cited 1  
Atk. 250. Snee and Prescott,

ib. 245. Exp. Walker, Co. B.  
L. 419. Exp. Wilkinson, cited  
Ambl. 400. D'Aquila and Lamb-  
ert, ib. 399. Birckett and Jen-  
kins, cited Cowp. 296.

been

been paid for, the question as to the effect of such assignment, upon the consignor's right of stopping the goods *in transitu*, has given rise to a great difference of opinion and contrariety of determination.

BOOK III.  
CHAP. V.  
Sect. II.

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Against the right of the consignor to stop *in transitu*, as against an *assignee of the consignee for a valuable consideration without notice*, it has been held<sup>1</sup>, that a bill of lading made out by a consignor, directing the delivery of goods either to a particular person by name, or to the order of the shipper, and indorsed by him either in blank or to a particular consignee, is in its nature a *negotiable instrument*; which transfers the *property* at law, to the consignee, in the same manner as the indorsement of a bill of exchange is an assignment of the *debt* contained in it to the payee: that the right to stop *in transitu* was originally allowed in equity for the relief of the *consignor* against a *consignee* who had not paid for the goods, because it was considered as unconscionable to prevent a consignor in such case from getting them back again if he could, before they were actually delivered: that this, however, was founded only upon equitable principles, and though adopted in courts of law since the case of *Snee and Prescott* in Chancery, yet that it is only an exception to the rule of law by which the property vests absolutely in the con-

<sup>1</sup> Lickbarrow and Mason, 2 T. R. 63, S. C, 5 T. R. 683.



BOOK III.  
CHAP. V.  
SECT. II.

signee by indorsement and delivery of a bill of lading: but that an *indorsee* of the consignee stands in a very different situation; he gives credit to the bill of lading, trusts only to the indorsement of that as of a negotiable instrument, and if he takes it for a valuable consideration without notice, the property is as absolutely and effectually transferred to and vested in him, as a debt assigned by the indorsement of a bill of exchange under similar circumstances; in which case though the consideration may be gone into as between the original parties the drawer and payee, yet it cannot as between the drawer and a third person, an indorsee, for a valuable consideration without notice: that the consignor, by indorsing the bill of lading to the consignee, by his own act puts it in the power of the latter to assign it by indorsing it over; and to allow the right of the consignor as against such indorsee, would be to enable the original parties to commit a fraud upon a third person, a *bonâ fide* purchaser: and finally, that this difference of effect of the indorsement, in these different cases, is founded, not upon the custom of merchants, which only establishes that such an instrument may be indorsed, but upon legal principles, the *effect* of such indorsement being properly a question of law.

On the other hand, it has been held<sup>r</sup>, that a bill of lading conveys no interest, but merely an

<sup>r</sup> *Mason and Lickbarrow*, 1 H. Bl. 357.

authority,

authority, to the master to deliver the goods, and to the consignee to receive them and discharge the ship-master as having performed his undertaking: that if it did more, the possession of a bill of lading would have greater force than the actual delivery of the goods themselves, for though the possession of goods is *primâ facie* evidence of title, yet that may be of different kinds, according to the title by which it is acquired; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the assignment of a debt by indorsement of a bill of exchange; which can only be used for that specific purpose, and the negotiability of which is founded upon the custom of merchants and positive law, and which thereby passes the whole interest in the debt so completely that the holder for a valuable consideration, without notice, is not affected even by the crime of the person from whom he received it: that bills of lading, on the contrary, may be assigned for as many different purposes as the goods themselves may be delivered; they may be indorsed to the true owner of the goods by the freighter acting merely as his servant, or to a factor to sell for the owner, or by the seller of the goods to the buyer; they are in no certain form; they seldom, upon the face of them, bear any indication of the purpose of their indorsement; and their tenor is

BOOK III.  
CHAP. V.  
Sect. II.

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often purposely false : no commercial author speaks of them as a negotiable instrument, transferring property like a bill of exchange ; and in several instances, evidence has been given that they were not so considered, even in the received opinion of merchants : that as there is no positive law, neither can any custom of merchants apply to such an instrument, and which being so various in its form and use, it is impossible to apply to it the same rules as govern bills of exchange : that a bill of lading is therefore not negotiable, though it may be assigned ; but that such assignment passes only such right and no better, as the person assigning had in it : that even as between consignor and consignee, the right to stop *in transitu* is not merely a relief afforded by courts of equity, upon equitable principles only, and adopted since by courts of law ; but a strictly legal right, and founded upon legal principles : that in our oldest books, payment of the price was considered as a condition precedent in the contract of sale, and if the goods were not paid for, the contract was considered as incomplete, and the property as not vesting in the vendee before actual delivery into his possession : that since the variety of dealing introduced by the increase of trade, it has been found necessary to allow of a constructive delivery and possession in many cases, so far as to enable the vendee to act in some respects as owner of the goods, to assign them, sue third persons, &c. ; but that still the title of the vendor



vendor is never entirely divested till actual delivery, and he may therefore for just cause countermand it and stop the goods *in transitu*: that the case of Snee and Prescott was determined upon legal grounds, and is an authority not only for the right of the vendor while unpaid, to retain against the consignee, but even against those claiming under the consignee by assignment for a valuable consideration without notice: and that there are cases at law to the same effect. And upon the whole, that the right as between consignor and consignee being admitted in all cases, and this being a perfectly legal right of property in the thing itself, and not founded only upon a personal exception to the consignee, precluding his demand merely on the ground of iniquity, and as contrary to good faith, does not cease even as against a purchaser from the consignee for a valuable consideration without notice (88).

In

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(88) After this determination, reversing the judgment in the court of King's Bench, the case being carried to the House of Lords, a *venire de novo* was awarded; and upon the trial a special verdict was found, stating the same facts as had been given in evidence on the former trial; but the jury also further found, "That by the custom of merchants, bills of lading, expressing goods to have been shipped by any persons to be delivered to order or assigns, are, at any time before arrival, negotiable and transferable by the shipper to any other person, by the shipper indorsing his name, and delivering or transmitting the same so indorsed to such other person. And that the property

BOOK III.  
CHAP. V.  
SECT. II.

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In considering, however, the doctrine of the consignee's right to stop *in transitu*, as against the consignee, to be merely an equitable right founded upon principles originally established in courts of equity, the court of King's Bench did not mean at the same time to impeach that doctrine as adopted since by courts of law: but only to narrow the extent of it, so as to prevent its operating to the prejudice of a *bonâ fide* purchaser for a valuable consideration without notice. The same court has held\*, that if an assignee of the consignee purchases with notice of the goods not being paid for, he must

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\* Salomons and Nissen, 2 T. R. 674.

property is transferred to such other person by such indorsement, and delivery or transmission. And that by the custom of merchants, indorsements of bills of lading in blank, that is, by the shipper with his name only, may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the contents to such person. And according to the practice of merchants, the same, when filled up, have the same effect as if they had been done by the shipper, when he indorsed the bill of lading with his name as aforesaid."—The court of King's Bench in giving judgment did not enter into any further argument (understanding the case was to be carried to the House of Lords), but simply expressed their adherence to their former opinion.

The custom as found by this special verdict, seems to go beyond what has ever been contended for. It makes no distinction of indorsements, whether as between principal and factor, or between vendor and vendee, or whether with or without consideration, or with or without notice, &c.

stand

stand in the same situation with the consignee himself, and that the consignor may stop *in transitu*, and retain possession as against such assignee.

BOOK III.  
CHAP. V.  
Sect. II.

The right of stopping *in transitu* is not taken away by the consignee's having paid *in part* for the goods, but subsists unless the whole of the price has been paid <sup>1</sup>(89).

Nor by the consignee's making himself liable by accepting bills upon the credit of the consignments<sup>u</sup>. In all cases where goods are sent in the way of sale, the consignee is liable to pay; but till payment the owner, in case of his failure, may stop them *in transitu*.

But the consignor's right is gone, when the value has been paid; then the sale is complete, and lien is out of the question<sup>x</sup>.

Or when the goods are *delivered* into the possession of the *vendee*.

What shall be considered as such a delivery as will divest the vendor's right to stop *in transitu*, or under what circumstances goods shall be considered as being *in transitu* or not, must obviously depend upon cir-

<sup>1</sup> Hodgson and Loy, 7 T. R. 440.

<sup>u</sup> Kinloch and Craig, 3 T. R. 122.

<sup>x</sup> Ibid.

(89) In the case above referred to, the court said the right appeared to have been considered in the same way in Wiseman and Vandeput. It appears to have been so considered also in Snee and Prescott; for the consignee of the silks in that case, had previously himself consigned a quantity of serges which had been employed in the purchase of part of the silks.



BOOK III.  
CHAP. V.  
SECT. II.

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stances as various as those which necessarily attend the different modes of transmission and delivery of goods, practised amongst traders. But a general distinction seems to have been laid down, between what is called a *constructive* delivery or possession, and an *actual* or *final* delivery to the vendee himself. The same sort of delivery which, as between buyer and seller where there is no insolvency, would be sufficient to deprive the consignor of the right to take the goods back, would not be so in the case of the consignee's becoming insolvent or a bankrupt<sup>1</sup>.

In cases of the latter kind; as, where goods delivered by the vendor to the special agent of the vendee, and sent by the particular conveyance mentioned in the vendee's order, were afterwards countermanded by the vendor, on hearing of his insolvency; it was held<sup>2</sup>, that the constructive possession in the consignee, by such delivery for the purpose of being transmitted to him, was not to be regarded, and that there must be an actual delivery to the consignee himself.

So where goods, being sent from the country directed to the vendees, and a bill of parcels sent them by the post, with advice of the vendor's having placed the amount to their credit, were delivered, upon their arrival in town, to an innkeeper who gave the vendees notice of their being

<sup>1</sup> See Ellis and Hunt, 3 T. R. 469.

<sup>2</sup> Stokes and Lariviere, cited in Ellis and Hunt, 3 T. R.

arrived

arrived for them. The vendees ordered the innkeeper to send them down to the quay to be shipped, but arriving there too late, they were returned to the inn, and some days after, the innkeeper received directions from the vendee to keep them for the sailing of another ship. The vendees became bankrupt, and the vendors then sent word to the innkeeper to detain the goods. It was held<sup>a</sup>, that though this might be a legal delivery to the vendees to many purposes, yet that nothing but an absolute and actual possession could take away the vendor's right to stop *in transitu*; and Ld. Mansfield is reported to have said, the goods must for this purpose come to the corporal touch of the vendees, and that a delivery to a third person to convey to them, was not sufficient.

This, however, must plainly be considered as a figurative manner of speaking, and has never been literally adhered to. There may be an actual delivery of goods without the vendee's seeing them; as by delivery of a key of the vendor's warehouse to the purchaser. And where goods sent from the country were brought to an inn in town, and the vendee becoming a bankrupt, the *provisional assignee* under his commission made a demand of the goods, and *put his mark* upon them, but did not take them away, because they were at that time under an attachment made by a creditor of the vendee's; and afterwards the vendor hearing the

<sup>a</sup> Hunter and Beale, cited *ib.*

vendee

BOOK III.  
CHAP. V.  
SECT. II.

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vendee was a bankrupt, wrote to countermand the delivery: it was held <sup>b</sup>, he was too late; the possession by the provisional assignee being sufficient, even if a corporal touch were necessary; for by the assignment, the bankrupt was stripped of all his property, which was then vested in the provisional assignee, whose putting his mark was all that could be done, under the circumstance of the attachment.

Goods sent by order of the vendee to a *packer*, have been considered, while in the hands of the latter, as being still *in transitu*, as between vendor and vendee <sup>c</sup>.

As between *principal* and *factor*, the general right of property remaining in the former, and only a special right of property in the latter to enable him to execute his commission <sup>d</sup>: the right of stopping *in transitu*, is out of the question, this never occurring but as between *vendor* and *vendee* <sup>e</sup> (90).

<sup>b</sup> Ellis and Hunt, 3 T. R. 464.

<sup>c</sup> Hunt and Ward, cited ib.

<sup>d</sup> Hollingworth and Took,

<sup>e</sup> H. Bl. 501.

<sup>e</sup> Kinloch and Craig, 3 T.

R. 786.

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(90) There may be no room for the question as to the right generally; but as the factor's lien, which he has under this special property, attaches by the possession, it should seem that questions as to the *determination* of this right, or as to the circumstances under which it may or may not be considered as at an end, are equally material between these parties, as in other cases.

See



See further in the case of Tooke and Hollingworth<sup>f</sup>, an incidental discussion of the question how far *executory* contracts are *determined* by the bankruptcy; particularly where property consigned is not sent, or not delivered to be sent, till *after* the bankruptcy of the consignee, but which was not known at the time to the consignor.

BOOK III.  
CHAP. V.  
SECT. II.

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III. *In the case of property coming to the bankrupt, after his bankruptcy.*

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13 Eliz. c. 7. s. 11.

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The commissioners are empowered to dispose of all property, real or personal, *coming to* the bankrupt, *after* his bankruptcy, whether by descent or purchase, at any time before his debts are fully paid and satisfied, or otherwise agreed for, or (which is equivalent under the later statutes) before the certificate is allowed. But as a bankrupt cannot be prevented from the future exercise of his personal labour and industry, for the maintenance and advancement of himself and his family; or from entering into contracts and dealings in the way of trade upon his own account; and is even frequently suffered so to do, and thereby to become

<sup>f</sup> 5 T. R. 215. 2 H. Bl. 501.

possessed

BOOK III.  
CHAP. V.  
SECT. II.

possessed of property, without any interference or claim on the part of the creditors and assignees under the commission; questions have frequently arisen as to the nature and extent of the interest which, in such cases, vests in the bankrupt and assignees respectively: and for some time the courts seem to have had a difficulty to ascertain any clear general principle of determination upon the subject.

In a case which has been considered as a leading one upon the subject<sup>g</sup>, it was held, upon the question of what property a bankrupt has in future effects, after a second commission, under which he has not paid fifteen shillings in the pound; that though the future effects are *liable* to be seized for the benefit of creditors, yet the bankrupt has *in the mean time* such a property in them as enables him to transact and sell to a *bonâ fide* purchaser.

Afterwards, *Ld. Hardwicke* is reported<sup>h</sup> to have laid it down in very general and unqualified terms, that a bankrupt is *incapable* of *acting* or carrying on *any* trade at all; that all his future personal estate is affected by the previous general assignment; and that every new acquisition vests in the assignees. This doctrine appears to have been for some time adopted in its utmost extent, and it was accordingly held<sup>i</sup>, where a bankrupt had

<sup>g</sup> *Ashley and Kell*, Str. 1207.

<sup>h</sup> 1 *Atk.* 253.

<sup>i</sup> *Evans and Mann*, Cowp. 569.

traded

traded and sold goods after his bankruptcy, that the assignees might sue the vendee for the price in their own names, without naming themselves assignees; for it was said, the contract being after the bankruptcy, when the bankrupt *could* have no property of his own, the goods were the property of his assignees, and the sale a contract as their agent by operation of law and on their account (91). This case, it is true, might be considered in the same light as one between the bankrupt and the assignees; but the same disabling doctrine seems to have been maintained even in the case between the bankrupt and a third person; and in an action for work and labour <sup>k</sup>, proof of the plaintiff's being a bankrupt at the time of the business done by him, was held sufficient to nonsuit him.

BOOK III.  
CHAP. V.  
SECT. II.

A distinction, however, was at length taken between these cases; and it was held that to the profits arising from a bankrupt's *personal labour* after the bankruptcy, even his assignees were not entitled<sup>l</sup>, and at least, whatever title the assignees might have, yet that the bankrupt himself was en-

<sup>k</sup> Hopkins and Dewar, Bull. N. P. 153.

<sup>l</sup> Chippendale and Tomlinson, Co. B. L. 462.

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(91) This point was not *necessary* to the determination of this case; the case being clear upon a different ground taken by Mr. J. Ashhurst, namely that in point of fact, the contract was made with the assignees themselves personally.

\*T

titled



BOOK III.  
CHAP. V.  
Sect. II.

titled as against all *other* persons; that he might sue for them in his own name, and that no stranger who had contracted with him, could avail himself of the plea of bankruptcy in the plaintiff. This has since been extended to the case of money due to a bankrupt for work and labour, and *materials found*<sup>m</sup>, where the materials furnished, being necessary to the labour, were considered as blended together and forming one joint cause of action; and to that for *money lent* and advanced<sup>n</sup>, where the loan being subsequent to the bankruptcy, the money might be presumed to be money earned by his labour; and finally, to the case, not of the profits of personal labour only, or of things necessarily connected with that, but of goods acquired in a general way of trade: as to all which or other future *personal* estate of an uncertificated bankrupt, it seems now to be settled<sup>o</sup>, that the *absolute* property therein vests, without the necessity of a new assignment (92), immediately in his

<sup>m</sup> Silk and Osborn, Esp. N. P.  
140.

<sup>n</sup> Evans and Brown, *ibid.*  
170.

<sup>o</sup> Fowler and Down, Bos.  
and Pull. 44. Webb and Fox,  
7 T. R. 391.

(92) As to the new assignment, even of *personal* estate, see the opinion of Eyre Ch. J. in Fowler and Down. It is admitted that with respect to future *real* estate, there must be a subsequent conveyance to vest it in the assignees. Is this *distinction* perfectly accurate, or is it warranted by the statute?

A trader,

his assignees, who may claim and seize it for the benefit of the creditors; but that in the mean time a *special* property subsists in the bankrupt, sufficient as against all the world but his assignees, and which enables him to convey a title to third persons<sup>p</sup>

<sup>p</sup> La Roche and Wakeman, Peake, 140.

A trader, by committing an act of bankruptcy, is not divested immediately of the *property* in his estate and effects; he is divested only of the power of disposing of them to the prejudice of his creditors. The power of disposing of them, is transferred to the commissioners; but until an actual disposition made by them in the manner specifically directed by the statutes, the legal property remains in the bankrupt.

Besides the general power given them to dispose of every thing the bankrupt was entitled to at the time of his bankruptcy, they are empowered also to dispose of what comes to him after that time, and until his debts are fully satisfied. And as in the case of the former, the *property* was considered as continuing, notwithstanding the bankruptcy, still to be vested in the bankrupt, until actual assignment, though unattended with any beneficial interest, as against his creditors; so in the latter case of real or personal estate coming to him after the bankruptcy and assignment, it should seem that regularly the legal property in *all* such subsequent acquisitions ought to have been considered as equally vesting in the bankrupt himself, until an actual *subsequent* assignment, though in like manner unattended with any power of affecting it to the prejudice of his creditors, but sufficient to entitle him as against all other persons.

The statute, with respect to *future* acquisitions, enumerates *personal* as well as *real* estate, gives the commissioners precisely the same powers, and directs the same manner of disposition and application, as with respect to the property at the *time of the bankruptcy*; and the terms, bargained and sold, used in the statute, are not necessarily referable to real estate only.

BOOK III.  
CHAP. V.  
Sect. II.

subject to be disaffirmed by the assignees, but to which it is not competent to other parties to object.

At the sametime, where the assignees and creditors under a commission sell the effects to the bankrupt himself, and suffer him to continue in trade without claim or interruption, in the course of which he acquires property and incurs new debts: this, though it may not discharge such future effects absolutely, as between the bankrupt and the assignees and creditors under the commission, yet, as between the two sets of creditors, it falls within the principle that a man, who having a lien, stands by and lets another make a new security, shall be postponed; and the new creditors will be preferred, out of the effects, to the creditors under the commission, who will be entitled only to the surplus<sup>9</sup>.

The certificate being *signed* does not prevent the commissioners from disposing of any effects coming to the bankrupt afterwards, and at any time before it is actually *allowed*. A great length of time may intervene between the signing and allowance, but till allowed it operates as nothing. A *legacy* coming to a bankrupt after the signing, but before the allowance, was held<sup>r</sup> to belong to the assignees for the benefit of the creditors; and a mortifying case has occurred<sup>s</sup>, where a lottery ticket was

<sup>9</sup> Troughton and Gitley,  
Ambl. 430.

<sup>r</sup> Tudway and Bourn. Burr.  
717.

<sup>s</sup> 7 T. R. 296.



given to a bankrupt by a creditor who had *signed* his certificate ; but turning up a prize before the certificate was *allowed*, it was claimed and shared by the creditors.

BOOK III.  
CHAP. V.  
Sect. II.

## SECT. III.

*Effect of the Assignment considered with respect to dispositions of the bankrupt's property by Fraud.*

13 *Eliz. c. 7. s. 2. 12.*

1 *Ja. c. 15. s. 5.*

21 *Ja. c. 19. s. 10, 11.*

To consider all the cases of fraudulent dispositions of property by a bankrupt, which by reason of the fraud may be avoided by his creditors, would not only occasion a repetition of several things already treated in other parts of this work ; but would lead also to the discussion of subjects, which, though they may occur *incidentally* in cases of bankruptcy, are at the same time questions merely of common law, or such as arise under particular statutes, bearing no immediate or direct relation to the *bankrupt laws*. I shall therefore confine myself here, to such cases only, as have been considered either as frauds upon the bankrupt *laws*, generally, that is, as tending to defeat the objects and general policy of these laws ; or such as have been made the subject of *express* provision and regulation by some one or other of the statutes of bankrupt in particular.

I. *Dispositions of property made in Contemplation of bankruptcy.*

The *statutes*, although they contain numerous provisions for the defeating of all secret *trusts* and *concealments*, or the *fraudulent possession* or *detention* by other persons, of property which belongs really to the bankrupt himself<sup>1</sup>, no where make mention of dispositions or conveyances made in *contemplation of bankruptcy* for the purpose of *preferring* one *creditor* to another; and seem even to have been studiously and cautiously framed with a view to *avoid* overturning any dispositions of property made for a *valuable and full consideration*<sup>2</sup>. But as in another view, it has been collected, from considering the tendency of a variety of other provisions, in the statutes taken all together, that *equality* amongst the general creditors of a bankrupt is a principal object and leading principle to be followed in the construction of the bankrupt laws; it has been thought to be consonant to the general spirit and policy of these laws, to consider such equality, as not confined to (what seems however to be the single case in which such equality is, *in terms*, made the subject of *express* provision, namely,) that of the commissioners reducing all the creditors, without regard to the different natures

<sup>1</sup> See the 13 Eliz. c. 7. s. 2, 5,  
6, 7, 12.—1 Ja. c. 15. s. 2, 5, 7,  
8, 10.—21 Ja. c. 19. s. 5, 6, 7, 10.  
—5 Geo. 2. c. 30. s. 21.

<sup>2</sup> See the 13 Eliz. c. 7. s. 7, 12.—  
1 Ja. c. 15. s. 5.

of their respective *securities*, to a level in respect of the distribution of property remaining in the bankrupt at the time of the act of bankruptcy; but as extending also to prevent the bankrupt himself from making any voluntary distribution of his property, even amongst *fair creditors*, at any time *before* his bankruptcy, provided he had at the time, an act of bankruptcy in contemplation.

As this subject, in the cases of conveyances by *deed*, has already been considered at some length in another place, it is almost unnecessary here to observe, that all such conveyances by *deed*, are not only held to be acts of bankruptcy in themselves, but that they are also *void*, as against creditors.

And with respect to cases where the transaction is *not* by *deed*; as the very same principles apply, as far as I can discern, to these, as to those of conveyances by deed, with the single difference, that the former are not acts of bankruptcy in themselves; I will not tire the reader with a restatement of what he will find collected under a former title of this work<sup>\*</sup>; but shall give here, only a general summary of the principal points that have been determined, either incidentally or directly, in the several cases that have occurred upon this subject.

All dispositions of property then, made in contemplation of bankruptcy, though without deed; whether by *delivery* of a *written instrument*, as a note<sup>y</sup>, bill of exchange<sup>z</sup>, order for payment of

<sup>\*</sup> B. II. ch. II. sect. II.<sup>z</sup> Harman and Fisher, Cowp.<sup>y</sup> Anderson and Temple, Barr.

117.

2235.



BOOK III.  
CHAP. V.  
Sect. III.

money<sup>a</sup>, order for delivery of property<sup>b</sup>, bill of parcels<sup>c</sup>, or letter of attorney to receive debts<sup>d</sup>; or by a *colourable sale*<sup>e</sup>; or actual *delivery* of goods<sup>f</sup>; or by suffering them to be taken in *execution*<sup>g</sup>; though they are not acts of bankruptcy in themselves, yet if they are made *voluntarily*, to *prefer* a particular creditor, in contemplation of an impending bankruptcy, and with a view to defeat the consequences of it, are held to be *void*, as *frauds* upon the general *spirit and policy* of the bankrupt laws.

And this, though made for a *valuable* consideration, and *bonâ fide*, as between the parties; and though the insolvency or embarrassments of the bankrupt are not known to the creditor<sup>h</sup>.

And though the act, of delivery or transfer of the property, is *completed* before the bankruptcy<sup>i</sup>.

But if the preference is not the mere voluntary act of the party, but only *consequential*, as it is called; as, where the act done is in the ordinary course of business and upon the application of the creditor<sup>k</sup>; or in pursuance of some prior agreement which was not made in contemplation of bankruptcy<sup>l</sup>; or where done to deliver the party from

<sup>a</sup> Yeates and Grove, 1 Vez. J. 230.

<sup>b</sup> Rust and Cooper, Cowp. 629.

<sup>c</sup> S. C.

<sup>d</sup> Exp. Scudamore, 3 Vez. J. 85.

<sup>e</sup> Martin and Pewtress, Burr.

<sup>f</sup> 2477.

<sup>g</sup> Rust and Cooper.

<sup>h</sup> Harman and Spottiswoode, Co. B. L. 97. and cited in Harman and Fisher.

<sup>i</sup> Alderson and Temple, Harman and Fisher, Rust and Cooper.

<sup>j</sup> Same cases.

<sup>k</sup> Same cases.

<sup>l</sup> Harman and Fisher.

legal process<sup>m</sup>, or from the threat and apprehension of it<sup>n</sup>, or even from the pressure and importunity of the creditor<sup>o</sup>: then it will not be void, though made the very moment before an act of bankruptcy committed. And where the preference is consequential merely, the creditor's or bankrupt's own knowledge or apprehension of his insolvency is immaterial<sup>p</sup>; that being frequently the very reason of the creditor's taking such measures against the bankrupt, as are precisely the ground of justifying the act done by the bankrupt in consequence of it.

BOOK III.  
CHAP. V.  
SECT. III.

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## II. *Provisions for Wife and Children; Conveyances in trust, &c.*

By the second section of the statute of Eliz. the commissioners may assign any *lands, tenements, and hereditaments* that the bankrupt shall have purchased or obtained for money or other recompense, *jointly with his wife, children, or child*, for his sole use, or for such use as he may have in the same; or *with any person* of trust for his use: and the assignment shall be effectual against the bankrupt, his wife or heir, child and children, and such person as by such joint purchase shall have any estate or interest in the premises.

The 12th section of the same statute contains a general proviso that the act shall not extend to

<sup>m</sup> Alderson and Temple,  
Harmaa and Fisher.

<sup>n</sup> Thompson and Freeman,  
1 T. R. 155. Exp. Scudamore,  
3 Vez. J. 85.

<sup>o</sup> Yeates and Grove. Exp.  
Scudamore.

<sup>p</sup> Same cases.

conveyances

BOOK III.  
CHAP. V.  
SECT. III.

conveyances made (before the bankruptcy) *bonâ fide*, and not to the use of the bankrupt himself only or his heirs, and where the parties to the conveyance are not privy to the fraudulent purpose to deceive creditors.

By the statute of Ja. *any lands, &c. or goods* conveyed by the bankrupt, or by him procured or caused to be conveyed to any of his *children*, or *other person or persons*; or *debts* transferred by him into other mens names; may be disposed of by the commissioners in as ample a manner as if he had been actually seized or possessed thereof, or the debts were in his own name, of the like estate or interest to his own use; and such disposition shall be good against the bankrupt, his heirs, executors, administrators, and assigns, and such *children and persons* as are subject to the statute, and all others claiming under the bankrupt, or those to whom such conveyance is made: *except* the same shall be conveyed, &c. for or upon *marriage* of any of his *children*, both the parties married being of the years of consent, or for some *valuable* consideration.

It seems to be settled that to make a conveyance fraudulent as to creditors under the 13 Eliz. c. 5. it must appear that the party was *indebted* at the time of executing the deed, or immediately after<sup>9</sup>; and the same rule seems formerly to have been

<sup>9</sup> Walker and Burrow, 1 Atk. 93. Bull. N. P. 257.

applied



applied to deeds under these statutes of bankrupt<sup>r</sup>; but from some subsequent cases it may be inferred, that it is sufficient to bring a conveyance within these statutes, that the deed be *voluntary*, that is, not for a valuable consideration<sup>s</sup>.

BOOK III.  
CHAP. V.  
Sect. III.

Where a trader, *after* marriage, conveyed lands to trustees, *expressed* to be in consideration of five shillings and other valuable considerations, in trust for himself for life, then to his wife for life, then to his son, &c. : this was held to fall directly within the 1 Ja. ; and that the expression of its being in consideration of five shillings and *other* valuable considerations, did not oblige the court to hold it at all events to be for a valuable consideration, and could at most only let in *evidence* of other valuable considerations<sup>t</sup>.

As the commissioners can assign nothing but what the bankrupt himself could honestly assign to them ; a conveyance to children to secure some trust-money of theirs, which the bankrupt had in her hands, made *bonâ fide* in execution of the trust, was sustained against the assignees, though the bankrupt was in doubtful circumstances at the time, and had not kept the money separate and distinct from her own<sup>x</sup>.

<sup>r</sup> Crisp and Pratt, March. 34.  
Lilly and Osborn, 3 P. W. 298.

<sup>s</sup> Walker and Burrows, 1  
Atk. Fryer and Flood, 1 Bro.  
160.

<sup>t</sup> Walker and Burrows, 1  
Atk. 93.

<sup>x</sup> Cock and Goodfellow, 10  
Mod. 489.

and

BOOK III.  
CHAP. V.  
SECT. III.

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And a conveyance by the bankrupt to his son and daughter to secure a sum of money given them by the grandfather, was held not to be voluntary, it appearing that the bankrupt, at the time of executing the deed, had goods of the grandfather in his hands<sup>v</sup>.

If a settlement is made *before* marriage, though without a portion, it will be good; and it is equally so though *after* marriage, provided it be on payment of money as a portion; or a new additional sum of money; or even an agreement to pay money if it is afterwards paid pursuant to the agreement; or if the wife joined in selling some part of the land<sup>a</sup>. And if a brother, having money of his sister in his hands, refuse to pay it to her husband, unless he will make a settlement upon her, such settlement will not be fraudulent<sup>b</sup>.

The *wife* has been held to be within the 1 Ja. and that the providing for wife and children is the same as providing for himself<sup>c</sup>.

It is held to be very clear that one of the cases to be remedied by the statute of 1 Ja. is that of a father buying an estate from a stranger, to be conveyed to a child. Where, therefore, an estate was *bequeathed* to a child, in pursuance of an agreement between the testatrix and the father, who had

<sup>v</sup> Bateman's case, 1 Mod. 76.

<sup>a</sup> Brown and Jones, 1 Atk. 188.

<sup>c</sup> Tucker and Cosh, Style, 289.

<sup>b</sup> Brown and Jones, 1 Atk. 188.

<sup>c</sup> Tucker and Cosh, Style, 288.

lent the testatrix a sum of money to purchase the renewal of a lease; and the testatrix gave him a promissory note to *repay* the money *unless* she should bequeath the estate to one of his children: this was held to be within the statute\*.

BOOK III.  
CHAP. V.  
SECT. III.

### III. *Fraudulent Extents of the Crown.*

If lands, goods, &c. of the bankrupt are extended *after* his bankruptcy by any person pretending to be accountant or indebted to the king, the commissioners may sell the lands, goods, &c. if upon examination upon oath it appear that the contract on which the debt to the accountant arises, was originally made with any other person than the accountant, or for the use or trust of any other person.

From this has been derived *one* of the arguments used in support of the doctrine (mentioned in another place) that a *bonâ fide* extent of the crown will prevail against any assignment of the bankrupt's effects, made subsequent to the teste of the extent<sup>f</sup>.

\* Fryer and Flood. 1 Bro.

<sup>f</sup> See Queen and Arnold, 7 Vin. 108.

### IV. *Property*



IV. *Property in Possession of the bankrupt  
as Reputed owner.*

By the 21 Ja. after premising (93), "for that it often falls out that many persons before they become bankrupts do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof; and dispose the same as their own:" it is enacted, that "if any person at such time as he shall become bankrupt, shall by the *consent and permission* of the *true owner and proprietary* have in his *possession, order, and disposition* any *goods or chattels* whereof he shall be *reputed owner*, and take upon him the *sale, alteration, or disposition, as owner*, the commissioners shall have power to sell and dispose the same for the benefit of the creditors seeking relief under the commission, as fully as *any other part of the estate of the bankrupt.*"

This is the only statute, which, deviating from the line laid down in all the rest, and adhered to in all the judicial explanations of them, namely, that the commissioners should dispose of no pro-

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(93) This preamble is, by the misprinting of the statutes, placed in a different section (10th) from that of the enacting clause (11th) to which it relates.

perty but that to which the bankrupt is himself lawfully and honestly entitled, has subjected the property even of *others*, under particular circumstances, to be applied towards the payment and satisfaction of *his* debts, in the same manner as any other part of his *own* estate. The object of the statute being to protect the general creditors of a trader against the consequences of that false credit which might be acquired by his being suffered to have the possession and power of disposition of property as his own, which does not really belong to him, must undoubtedly have been, at all times, of the highest importance to the interests of fair trade. It appears, however, to have been so little acted upon for above a century after it had passed, that Ld. Hardwicke observes, it might, according to the rule in respect to laws in other countries, be said to have gone into *desuetude*: it never having been thought of, or at least received any judicial determination, till in a case immediately before his time<sup>2</sup>. Since it has come into notice, the very terms in which it is expressed have been objected to; in some instances, as wanting precision<sup>h</sup>, and in others, as being even hardly intelligible<sup>i</sup>. Notwithstanding, however, either that neglect or those criticisms, the policy of the regulations adopted by it for effecting the object in

BOOK III.  
CHAP. V.  
SECT. III.

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<sup>2</sup> 1 Atk. 156, 157. 163.

Burnell, Dougl.

<sup>h</sup> Willes, J. in Walker and

<sup>i</sup> 1 Atk. 159.

BOOK III.  
CHAP. V.  
Sect. III.

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view, does not appear ever to have been doubted : it has been discussed, but never directly questioned ; and its wisdom has, very recently<sup>k</sup>, been in a distinguished manner recognized and approved. With respect to the objections to the expression of its clauses, it would be presumption to affirm that they are altogether without foundation ; or for proof of the plainness and perspicuity of the language, to appeal only to common apprehension ; but it may at least be allowable to observe, that a statute, so vaguely and darkly penned, as this has been said to be, could hardly have deserved the praise it has received, and that the objections themselves seem to be still more effectually refuted by the remarkable uniformity of construction to be found in the numerous determinations upon this statute in modern times, and in which, except as to a question about the operation of the preamble, there has hardly been a single instance of any contrariety of opinion.

Upon the subject of the *construction* of the statute *generally*, and the reasons upon which the deviation from the general rule alluded to above, has in this instance been founded ; the first consideration which occurs, is the nature of the property which is the subject of its operation. This, by the express words of the statute, applies exclusively to *goods and chattels* ; a restriction which seems to

<sup>k</sup> *Ld. Kenyon in Gordon and E. I. Co.* 7 T. R.



be founded upon an essential distinction betwixt moveables and real property, in respect of the different circumstances which constitute the evidence of the real ownership in the one and the other respectively, and the different ways in which such ownership is ascertained, or may be judged of by the rest of the world.

BOOK III.  
CHAP. V.  
SECT. III.

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The *possession*, of *real* estate, is not the title, or evidence of the ownership in it, on which the world relies. A great variety of estates and interests are usually carved out of such property; the title to it may be and frequently is in one person, while the possession is in another, and this often merely a tenancy at will. He who would purchase, or take a security upon it, needs not be deceived, unless by his own fault; he may call for the title deeds, by which such property is held, and satisfy himself, whether the possessor is entitled to it or not. And though he should not take possession or enter immediately into receipt of the rents and profits, he would still be at no prejudice; the property being not of a nature to be dissipated or destroyed, and the land remaining to him ultimately, secured by the title; if he has only taken care of what it was in his own power to do, namely, to obtain a sufficient one<sup>1</sup>. By the mere possession therefore and receipt of the rents and profits of *real* estate, a false or delusive credit cannot, generally speaking, be acquired; or at least not such as it may not be

<sup>1</sup> Stone and Grubham, Ro. Rep. 3.

easy for a creditor himself to guard against being deceived by, and against which therefore it cannot be expected that he should be entitled to the peculiar protection and relief which is afforded by this statute.

*Chattel* interests also, in *lands*, as terms for years; and even *personal* chattels *fixed to the freehold*; which are looked upon as part of the real estate to which they are annexed, and pass by the same conveyance with it, are, in relation to this statute, considered upon the same footing with real estate properly so called, and exempted from its operation.

But it is otherwise with respect to *moveable goods and chattels*; which pass by delivery, and of which, when the *property* is transferred, the delivery of the *possession* is generally the strongest and most essential evidence. The possession itself, of such property, *imports* the ownership in it; it is the title on which the world commonly relies, and which has generally no other means of judging or ascertaining in whom the true ownership is, than by seeing who is in the visible possession. He therefore who takes a conveyance of such property, though for a valuable consideration; without having that delivery to which he is entitled, and without which there is nothing either in the nature of the property, nor any check by title deeds as in the case of real estate, to prevent the original owner from dissipating and disposing of it to others;  
both

both renounces that which is his only real security, and enables the possessor to obtain that false credit, which it is the object of this statute to prevent.

BOOK III.  
CHAP. V.  
SECT. III.

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For this statute, while it differs in the *means* employed for the purpose, has yet the same *end* in view with all the rest of the statutes of bankrupt; namely, that of placing all those creditors who have equally trusted to the general personal credit of the bankrupt, as much as possible upon an equal footing with respect to the satisfaction to be obtained from the distribution of his property. And though the bankruptcy (as has been mentioned in another place) does not in ordinary cases interfere, to deprive a creditor of the benefit of any *specific lien*, fairly acquired in any property of the bankrupt's before the bankruptcy (except in the case of judgements unexecuted, which are levelled by the express words of a particular statute); yet where any one, entitled to the property in any personal chattels in the possession of the bankrupt, suffers him, either through design or neglect, to continue in the possession, order, and disposition of them as the apparent owner to the rest of the world; then this statute interposes, and subjecting the property in question to distribution amongst the general creditors, reduces the particular creditor to come in equally with the rest under the commission. In this, the statute operates, partly, as a penalty upon the owner of the property; depriving him of that priority which he



BOOK III.  
CHAP. V.  
SECT. III.

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would have had, but for his own misbehaviour, in neglecting to give notice to other creditors by having that delivery to which he was entitled (93), and in being the occasion thereby of drawing in the bankrupt's general creditors to trust him further than they would otherwise have done, upon the appearance and reputation of a property not really his own: partly, as considering him, as voluntarily placing himself upon a footing with the general creditors who trust only to the bankrupt's personal credit; inasmuch as by not taking possession, and thereby leaving it in the bankrupt's power to alienate or dispose of the property again to others, he leaves to himself only a personal remedy against the bankrupt; and confides merely in his personal credit, in the same manner as if he had only taken a bond, or a note (94).

Notwithstanding some previous authorities<sup>m</sup>, from which it might be implied, and one in par-

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<sup>m</sup> Bucknall and Royston, Pre. Cha. 285. Copeman and Gallant, 1 P. W. 314.

(93) In this view the operation of the statute has been compared to that of the register acts, where the party loses the benefit of the conveyance, by his own neglect in not giving notice. (Lee, Ch. J. in Ryall and Rolle, 1 Vez. and Atk.)

(94) For the positions contained in the above account of the general spirit and operation of the statute, the authorities may be found in most of the cases hereafter referred to, and particularly in the great case of Ryall and Rolle in 1 Vez. and Atk.

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particular which was an express resolution<sup>a</sup>, that the statute extended as well to conditional as absolute conveyances or sales; doubts of this were for some time entertained<sup>o</sup>; upon the grounds, that conditional sales or mortgages did not require a change of the possession; and that the mortgagee was not the *true owner*, that he had only a special property, but that the true ownership remained still in the mortgageor. But it was afterwards very solemnly determined<sup>p</sup>, that they are equally within the statute: for that the distinction as to the possession, arose from confounding mortgages of lands with those of goods, with respect to the latter of which, the mortgagee is equally entitled to the delivery of possession, as the absolute vendee, the moment the money is paid; that his suffering the mortgageor afterwards to continue in possession, is equally within all the mischief intended to be guarded against, inasmuch as he might mortgage them several times over, above the value of them, and then it would be the same as if they remained in his hands after one absolute sale; and that the mortgagee is the *true owner* within the meaning of the statute, which has used that description as opposed not to *special* but to *false or reputed* owner, that is, one who by spe-

<sup>a</sup> Stevens and Sole, cited 1 Atk. 157. 170. 1 Vez. 352.

<sup>o</sup> Bourne and Dodson, 1 Atk.

154. Brown and Heathcote, ib. 160.

<sup>p</sup> Ryall and Rolle, 1 Vez. 348. 1 Atk. 165.

BOOK III.  
CHAP. V.  
Sect. III.

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cious acts of ownership in possessing, ordering and disposing, is permitted, through fraud or laches, thereby to give himself an appearance, with the rest of the world, of property which does not really belong to him.

In considering the application of these principles of construction of the general spirit and intention of the act, to the particular circumstances of the several cases that have come under judicial determination, I shall divide the cases into two distinct classes; 1st, of those in which property, *originally the bankrupt's own*, continues in his possession notwithstanding a conveyance of it to another; and 2dly, of those, in which the property was *not originally his*, but being placed in his hands, is left in his possession at the time of the bankruptcy. And though some of the points determined in the cases under each class, are certainly common to both, yet the division will not, I believe, be found to be one merely of form; but such as arises naturally out of the subject itself, and the different views of it which the difference of the circumstances necessarily suggests.

I. *With respect to property Originally the bankrupt's Own, and remaining in his possession after a Conveyance of it to Another.*

The circumstances which have been considered as necessary to constitute a case of reputed ownership



ship of goods and chattels, within the meaning of this act, are, 1st, the possession; 2d, the order and disposition of them *as* owner; and lastly, the *consent* or *permission* of the *true* owner and proprietor.

BOOK III.  
CHAP. V.  
SECT. III.

The first is obviously essential, as being that to which the whole provisions of the statute relate.

With respect to the second, though possession itself is *prima facie* evidence of ownership, yet it will not, alone, bring a case within the statute, unless the party has also the *order* and *disposition*, *as* owner. This may sometimes admit of direct evidence, as to express acts of order and disposition; yet the statute seems to have been construed as not meaning strictly to require *actual* sale, alteration, or disposition, but merely that the property remain in the bankrupt's possession under circumstances which leave it in his *power* to order and dispose of it, or so that he *may* take upon himself the sale, alteration, or disposition as owner<sup>p</sup> (95).

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<sup>p</sup> Brown and Heathcote, 1 Atk. 64. Exp. Flyn, ib. 187. Welt and Skip, 1 Vez. 243. Lingham and Biggs, Pull. and B.A. 87.

(95) There seems to be some intricacy and obscurity in the language ascribed to Ld. Ch. J. Eyre in Lingham and Biggs. It is there said, that "being allowed to have possession of goods, under *circumstances which give the reputation* of ownership, brings the case within the statute." What those circumstances are, is not mentioned; but that they are not the

BOOK III.  
CHAP. V.  
Sect. III.

As the possession *alone* is not, so neither will it, though accompanied with the order and disposition, be sufficient, unless the third circumstance above mentioned also concur, namely, that they

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having, or the appearing to have the order and disposition, (though, if they are not, it seems difficult to conceive what otherwise they can be) appears from what is added, "that every man who can be said to be the reputed owner has *incidentally* the order and disposition;" and "that a party's being the reputed owner, *imports* that he has the order and disposition."

The premises and the inference seem to me here to be inverted. Ld. Hardwicke on the other hand, did not consider the order and disposition as *incidental* to the reputed ownership, but considered those, or as he expresses it, "specious acts of possession, order, and disposition," as the essential circumstances, *from* which the latter was to be *inferred*. (See Ryall and Rolle, 1 Vez. 372. Brown and Heathcote, 1 Atk. 164.)

In the same case (Lingham and Biggs), it is said, the words in the statute, "sale, alteration, or disposition" cannot refer to the *actual* sale as they seem to import, for that then the goods would be out of the power of the assignees, who can only take what remains in the bankrupt's possession. But the reason assigned seems to be inconclusive, and actual sale seems here to be taken for actual delivery: but actual sale may take place without delivery, and is one of the cases put by the judges in Ryall and Rolle, on the subject of the mischief it would be to permit mortgages without delivery to be out of the statute, inasmuch as the mortgagee may, continuing in possession all the while, sell and resell the same goods over and over again to different persons. There seems, therefore, to be no difficulty in understanding the words of the act to refer to *actual* sale, &c. as well as the apparent *power* of selling.

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are with the *consent* and *permission* of the *true* owner; whether with a fraudulent design, or from a plain laches <sup>q</sup>.

BOOK III.  
CHAP. V.  
Sect. III.

1. With respect therefore even to things *capable of delivery*, and of which there is nothing in the circumstances in which they are placed, to prevent actual possession being delivered; yet if the retaining the possession by the bankrupt, is *adverse* to the party to whom the conveyance of the property is made, and who sues the bankrupt in a court of justice to obtain the possession, or to restrain him from disposing of the goods; that will plainly take the case out of the statute, as excluding all idea of *consent*, either actual or presumed <sup>r</sup>.

Or if the goods are left in the bankrupt's possession, *bonâ fide* for the purpose of a mere *temporary custody*. As, where upon a sale of goods lying upon the quay, it was agreed between the bankrupt and the vendees that the goods should be removed and lodged in a warehouse, till the latter should have an opportunity of shipping them, they having none at that time; and the bankrupt accordingly had the goods removed into a warehouse of his own for the purposes of the agreement, where they had remained for a few weeks when the bankruptcy happened. This was held <sup>s</sup> not to be within the act of parliament, as the goods

<sup>q</sup> West and Skip, 1 Vez. 243.

<sup>r</sup> West and Skip, 1 Vez. 244.

<sup>s</sup> Exp. Flyn, 1 Atk. 185.

could



BOOK III.  
CHAP. V.  
Sect. III.

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could not be said to be left by consent of the vendees, in the order, disposition, or *power* of the bankrupt.

A possession by the bankrupt, of an undivided property, as *tenant in common* with the vendees; as in a case, where the bankrupt having sold a part of some goods absolutely, agreed to consign the rest to the vendees, to be disposed of by them for *his* use; seems to have been considered, at one time, by *Ld. Hardwicke*<sup>t</sup>, as not within the act; because in a case of tenants in common there must be a possession in one or other of them, and the possession of *one* is the possession of *all*. But that such *constructive possession* is not sufficient, and that the question upon this statute will depend upon other circumstances, and on the nature of the transaction itself, appears to be established by a subsequent determination<sup>u</sup>; where it was held that if a *partner* take a security, whether by absolute sale or mortgage, upon the other's part of the partnership effects, for money advanced as a private loan in his separate capacity, (and as to which therefore he is merely on the footing of any stranger); though he might as being partner before, and therefore, in construction of law, already in possession *per mie et per tout*, be said to require no actual delivery, yet this is not such a possession as

<sup>t</sup>S. C. 1 Atk. 187.

<sup>u</sup> Ryall and Rolle.

this statute requires ; and if he *permits* the other, after parting with all his interest in the specific effects, to remain in possession and to act and dispose as visible partner and half owner as before, this is permitting him to act inconsistent with his right, and is the very mischief described in the statute ; to allow which upon the ground of such constructive possession would be to let in all those frauds, and that false and delusive credit, against which it was intended to provide. And the case will be the same though the conveyance is made not directly to the partner himself, but to a trustee ; as to which, whether it be considered in effect as a direct conveyance to the party, or merely to the trustee, as distinct from him, possession ought to be taken by the one or the other respectively <sup>x</sup>.

It has been laid down as a rule, with respect to conveyances of chattels generally, that the possession ought to *accompany* and *follow* the deed ; and therefore that continuing in possession, after an *absolute* conveyance, will be fraudulent against creditors, either generally, or in cases under this statute. Upon this ground, a case ; in which, after an absolute conveyance in trust for creditors, it was agreed the party should still continue in possession and receipt of the profits for a certain time, and who did continue in the visible possession accordingly ; was held within the statute <sup>y</sup> ; notwith-

<sup>x</sup> S. C.<sup>y</sup> Bamford and Baron, 2 T. R.

BOOK III.  
CHAP. V.  
Sect. III.

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standing notice of the deed published in the newpapers, and an undertaking by the party at the time of the conveyance that he would account to the trustees, for all the profits to be received during his possession.

But if a conveyance is *conditional*, only to take effect on the performance of a condition at some future time, it will not be fraudulent or void for the party's continuing in possession, till the condition is performed (96); the want of possession in that case being *consistent* with the deed.

At the same time, although, where the possession is *inconsistent* with the deed, *that* is clearly fraudulent, upon the very face of it<sup>2</sup>; yet the possession happening to be consistent with the terms of the deed, will not exempt a case from the operation of this statute, if the other circumstances accompanying the possession are such as to create a false credit. In a case<sup>3</sup> which, though not in bankruptcy, has been often cited in illustration of this rule of the want

<sup>2</sup> Stone and Grubham, 2 Bullst.

<sup>3</sup> Bucknall and Royston, Pre. Cha. 285.

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(96) Such conditional conveyances have plainly no relation to this statute at all, and are quite different from those by way of mortgage. In the former, the *property* is not vested, nor the party *entitled* to the possession, till the condition is performed. In the latter, the conveyance is immediate, the property passes by the contract, and the party is entitled to the possession the moment the money is paid, though subject to being divested upon repayment. See Ryall and Rolle.



of possession not being fraudulent if consistent with the deed, it appeared, that a person in possession of goods then shipped on board a vessel about to go upon a voyage, conveyed them for a valuable consideration, by a bill of sale, with the produce and profits to arise from them in the course of the voyage; and by the terms of the bill of sale, the vendor was to continue in possession, and to negotiate and sell them for the advantage of the vendee. This deed was supported, because the trust appeared upon the face of the deed itself, and the possession, therefore, was consistent with it, and not for the *purpose* of giving a false credit. But in the same case it was also said, that it would have been otherwise, if it had been a case of bankruptcy, and would fall within the statute if the possession were such as to create a false credit<sup>b</sup>: as, where there is no act of notoriety to apprise third persons that the nature of the vendor's possession is different from what it was before.

So where the bankrupt, having bought an implement of trade (a dyer's plant), and given notes for the price payable at a future day, but being unable to pay the money when the notes became due, after being above a year in possession, agreed, in consideration of the notes being given up, to resell it to the same person, who at the same time agreed to let it to him again for a term of years at a certain rent equivalent to the interest of the ori-

<sup>b</sup> See also 1 Atk. 168. 180.

BOOK III.  
CHAP. V.  
Sect. III.

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ginal purchase money, with covenants for paying the rent, keeping the plant in repair, and not assigning it without consent, and that on default it should be lawful for the lessor immediately to take possession; and a deed of assignment was accordingly executed, with a full recital of the circumstances, and setting forth all the particulars of the agreement. Here, the possession was consistent with the terms of the deed, but the bankrupt having been in possession of the plant before *as his own* absolutely, and being permitted after a conveyance, still to continue in possession as visible owner; and there being no act of notoriety to shew that his continuing in possession was under any title different from that under which he obtained the possession originally, it tended necessarily to create a false credit, and the *form* of the transaction was considered merely as a contrivance to elude the statute<sup>c</sup> (97).

2. But property which is not in its own nature incapable of delivery, may sometimes, from the *circumstances* in which it is placed, either not admit

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<sup>c</sup> Bryson and Wylie, Pull. and Bof. 83. and S. C. cited in

Collins and Forbes, 3 T. R. 316.

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(97) See also below (p. 320.), the case of Lingham and Biggs, where the possession was also consistent with the terms of the deed; but as the other circumstances created a reputation of ownership, and might deceive creditors, it was held within the statute.

of a *complete* delivery, or actual *transmutation* of possession, or at least not of a delivery at the *time* of the conveyance.

BOOK III.  
CHAP. V.  
Sect. III.

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In the former case it will be sufficient if the best delivery is given that the circumstances will admit ; and in the latter, if all such *muniments* of the property and *evidences* of *ownership* in it, as it is in the bankrupt's power to give, are delivered ; and which is considered, under such circumstances, to be *equivalent* to a delivery of the specific thing. For though where a delivery of the specific thing is impossible, the non delivery cannot of itself be evidence of the *consent* to leave it in the possession, order, and disposition of the original owner ; yet, as in the case of things capable of a change of possession, the possession, being the evidence of ownership on which the world generally relies, is necessary to be given ; so with respect to these it is required, that the party, by taking possession of the *muniments*, should do every thing that can under the circumstances be done, to vest the property, with the power of ordering and disposing it, in himself ; and to divest the bankrupt of it, and thereby to deprive him of the means of obtaining that false credit which otherwise he might do, if allowed to retain the evidences of ownership in his own hands.

A *nominal* delivery of possession has been allowed where the goods were, *at the time of the conveyance*, already upon the *premises of the person to whom*



BOOK III.  
CHAP. V.  
Sect. III.

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*whom the conveyance was made.* In such a case there could be no false credit; the goods, from their situation, must have appeared to belong to the person on whose ground they were lying; the bankrupt himself had no possession otherwise than as having the property; and as no better or other delivery could have been under the circumstances, the *possession* was held to accompany and follow the conveyance of the *property*<sup>d</sup>.

In the case of *bulky goods*, of which an actual delivery is often inconvenient and sometimes impracticable, a delivery of the key of the warehouse where deposited, has always been held sufficient within this statute<sup>e</sup>. But a qualified delivery of this kind is not considered on the footing of being a delivery by *symbol* merely, which certainly would not do; but as being a delivery of that by which the party is enabled to *come at* the property; as furnishing him with the *means of reducing it into possession*, and whereby it is placed as much at his disposal, and out of the power of the bankrupt, as if there had been an actual transmutation of the possession<sup>f</sup>.

Of *ships* or their cargoes, *at sea*, the property is considered as effectually transferred, by a delivery of the muniments; such as the grand bill of sale in the case of a ship; or the bills of lading, policies

<sup>d</sup> Manton and Moore, 7 T. R. 67.

<sup>f</sup> S. C. *ibid.* Ward and Turner, 2 Vez. 443.

<sup>e</sup> Ryall and Rolle, 1 Vez. 362, 3.

of insurance, invoices, and the like, in the case of their cargoes: because of such property there can be no actual delivery, at the time<sup>g</sup>. And the same rule has been laid down, as to ships in a foreign port<sup>h</sup> (98).

BOOK III.  
CHAP. V.  
SECT. III.

But if the ship is *at home*, at the time of the conveyance; or returns into port afterwards, actual possession must be taken; otherwise it will not be exempt from the statute; even though the grand bill of sale is delivered<sup>i</sup>.

Of a *share*, however, of a ship, the delivery of the bill of sale has been held to be sufficient, though the ship was *not at sea*; the subject matter being, it was said, not capable of any other delivery<sup>k</sup> (99).

### 3. The

<sup>g</sup> Brown and Heathcote, 1 Atk. 160. Exp. Matthews, 2 Vez. 272. Atkinson and Malling, 2 T. R. 462. Ryall and Rolle, 1 Vez. and Atk.

<sup>h</sup> Exp. Batson, Co. B. L. 361.

<sup>i</sup> Stevens and Sole, 1 Atk. 157. 170. 1 Vez. 352. Exp. Matthews, 2 Vez. 272. Hall and Gurney, Co. B. L. 357.

<sup>k</sup> Exp. Standgroom, 1 Vez. J. 163. Co. B. L. 363. (100)

(98) In the case here referred to, *Dublin* was considered to be a foreign port, as to this purpose: but neither from the report of this case, nor from any other, can I find any grounds stated, upon which the limits, within which the line is to be drawn, can be ascertained. Various circumstances might make it as easy for the party to take possession in the port of Dublin or a port abroad, as in a port of Great Britain. There is a plain distinction between this case, and that of a ship *at sea*; in the latter, possession *cannot* be taken; in the former, it depends upon *circumstances*, and the *diligence* of the parties.

(99) Upon what reason this is founded I do not know. In Hall and Gurney, cited above as an authority that the delivery

BOOK III.  
CHAP. V.  
SECT. III.

3. The same principle, upon which, a delivery of the *muniments* is considered as *equivalent* to a delivery of the specific thing, where the property, though not in its own nature, yet from the circumstances in which it is placed at the time of the conveyance, is incapable of actual delivery, has

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of the grand bill of sale is not sufficient in the case of a *ship*, it appears that the interest actually conveyed was only so many *shares* of the ship. In that case it is true, it was the *whole* interest of the *party*, and therefore an *exclusive* possession as against the party, could be given: but if the question is whether actual possession *can* be taken of a *share* in a ship, as well as of any other undivided property, Hall and Gurney seems an authority that it may; for whether it is *one* or *more shares*, can make no difference.

In Gillespie and Coutts (Ambl. 652.), in which it was one of the points urged by counsel, that such a delivery was *hardly* possible, it does not appear that the Court decided upon that ground. That was not a case in bankruptcy, nor any question upon this statute. It was a case of competition between different vendees of different shares, who had all equally neglected, at the times of their respective conveyances, to take possession either of the ship, or of the grand bill of sale; and though one of them did so *afterwards*, yet he was held not to be entitled to any preference, it not appearing *how*, or *when* he had done so.

(100) In this case of *exp. Standgroom*, an objection was taken to the bill of sale, as void upon the registry act. What the objection was, or how it was answered, the report does not state. By sect. 17. of the act, the certificate of the registry is required upon the transfer either of the whole ship or of any *part*; otherwise the sale to be utterly null and void to all intents and purposes.

been



been applied to another species of property, namely, *choses in action*, which, from their own nature, admit not of a corporal *possession* or *delivery* at all. These, however, are held to be equally within the statute, with specific goods and chattels *in possession*<sup>1</sup>; not only upon the ground of the mischief it would be, if the provisions of the act as to legal interests were not to be followed as to equitable ones; but also as the description of *goods and chattels* is sufficient, in the construction of acts of parliament, to include *choses in action*. And, for the same reasons that assignments of choses in action are supported in equity, because the assignor by delivering to the assignee all the *documents* of the right to the property or the title by which it is held, and giving him authority to recover it in his name, and thereby furnishing him with the *means of reducing it into possession*, does every thing in his power to divest himself of the property and transfer it to the assignee; so, in cases under this statute, a like transfer and delivery is held both to be *equivalent* to, and at the same time equally *necessary* as, the the actual delivery of things in possession. Without such a delivery, the property would remain as much in the *possession, order, and disposition* of the original owner, and he would have it as much in his power to obtain a false credit, by shewing all the evidences of ownership in his hands, and

BOOK III.  
CHAP. V.  
Sect. III.

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<sup>1</sup> Ryall and Rolle, 1 Vez. and Atk. and Falkner and Case, and Gordon and E. Ind. Co. infra.

BOOK III.  
CHAP. V.  
SECT. III.

even by assignments to other persons, as in the case of specific goods left in his actual and visible possession.

In assignments therefore of choses in action, the securities, if any, must be delivered; and also notice given to the debtor<sup>m</sup>; the effect of which latter circumstance is not only to prevent the bankrupt himself from recovering it of the debtor, but also to prevent persons, who may enquire of the debtor respecting the title to the property, from being deceived; as they will find, upon such enquiry, that the property no longer remains in the bankrupt, though entered as his in the debtor's books<sup>n</sup>.

If there are no securities, as in the case of book debts merely, notice alone is sufficient; there being nothing that *can* be delivered<sup>o</sup>.

Where at the time of the assignment of the property of a chose in action, the bankrupt himself was not in possession of the security, having before pledged it with a third person for a debt due to the latter; the non-delivery of the security, and its remaining in the possession of him with whom it was pledged, were held to be no foundation to bring the case within the statute<sup>p</sup>. The bankrupt himself, in that case, had no possession to deliver; he had only an equitable right, that of redemption; and by

<sup>m</sup> Ryall and Rolle, 1 Vez. 367.

<sup>n</sup> 1 Atk. 171, 2, 7.

<sup>o</sup> Lawrence J. in Gordon and E. 1. Co. 7 T. R.

<sup>p</sup> Ryall and Rolle, 1 Atk.

177.

<sup>q</sup> Falkner and Case, 1 Bro. 125. 2 T. R. 491.

assigning which, he did every thing in his power to divest himself of the property. In this case, it was also laid down, not to be necessary that the assignee of the equity of redemption should give notice to the person with whom the security was pledged: first, because there was no property left in the bankrupt; secondly, because, supposing notice had been given, it would have been a transaction merely between the assignee and the pledgee (101).

But in a case<sup>9</sup>, where a question arose upon the effect of an assignment by an officer of an East India Company's ship, of goods shipped by him as part of his *privilege*; which is an indulgence of private trade allowed by the company to their officers, of sending goods in their ships to a certain amount, but which by the regulations of the company is only for the proper use of the officer, who is not allowed to dispose of it to any other person, and the goods are shipped in his own name, and

<sup>9</sup> Gordon and E. I. Co. 7 T.R. 228.

(101) *Qu.* Whether the rule with respect to notice laid down in Ryall and Rolle, and in Gordon and E. I. Co. does not apply equally in the present case. There being no property left in the bankrupt seems to be the very ground of the necessity of notice. And by the want of it here, was it not left in the bankrupt's power to redeem, and consequently to dispose of the security himself; and might not other persons have been defrauded, who upon enquiring of the pledgee must have been informed that the right of redemption remained with the bankrupt?



BOOK III.  
CHAP. V.  
Sect. III.

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received, warehoused, and sold by the company, in his name and as his privilege, and the money arising by the sale placed to the officer's credit in the company's books; it was held, that if an officer ship goods as his privilege, and upon their arrival assign them for a valuable consideration, the assignee, in order to take the case out of the statute, must either take actual possession, or, as the money received by the company upon the sale to the use of the officer is a chose in action, he must give notice to the company that the property has been assigned to him: otherwise, the assignee having no documents by which he can himself transfer the property, and all the evidence of title that appears in the company's books, shewing the property still to be in the officer, the latter will continue to have the ostensible ownership as to the rest of the world; which is the very mischief against which the statute intended to guard, and which the giving of such notice might prevent (102).

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(102) This case will occur again under the next class, to which it strictly belongs, of those which relate to property not the bankrupt's originally. But as the reasons upon which it was decided, were forcibly illustrated by one of the learned judges, upon the supposition as if it had been a case of property originally the bankrupt's own, and applies particularly here on the subject of notice in the case of assignments of choses in action, I thought it not improper to insert it in this place.

II. *With*

II. *With respect to property Not originally the bankrupt's, but left in his possession.*

Founding, partly upon an apprehension of the inconvenience that might follow from such a construction of the statute as should extend its operation to property belonging to other persons, and left in the bankrupt's possession, either for the necessary purposes of trade, or to answer the various occasions of common life; partly upon what appears to have been too precise and strict an application of a rule of construction which had been laid down in some cases with respect to statutes with particular and special preambles; an opinion was for some time entertained<sup>r</sup> that the generality of the enacting clause of this statute, which extends to *any* goods or chattels left in the possession of the bankrupt, was to be restrained by the preamble, and the construction to be confined to such cases only as came within the particular mischief there recited, namely, that of bankrupts *conveying their* goods to other persons, and yet *continuing* to have the *possession* and *disposition* of them *as* their *own*. But the question has been since settled, by an express determination<sup>s</sup>, that the construction is not to be governed by the preamble; for that

<sup>r</sup> L'Apostre and Le Plaitrier,  
1 P. W. 318. Exp. Marth, 1 Atk.  
159. Ryall and Rolle, 1 Vez.  
and Atk.

<sup>s</sup> Mace and Caddell, Cowp.  
232.

BOOK III.  
CHAP. V.  
Sect. III.

the statute, if it had been meant to comprehend nothing more than the particular case there recited, would be altogether nugatory; as the keeping possession, after a man had conveyed his own goods to a third person, would have been void even before this statute, according to the doctrine in Twine's case<sup>†</sup> (103). And the remedy for the inconvenience so much apprehended from this enlarged construction, is left to the exercise of that judicial discrimination which must always finally govern, in the application of a general law to particular cases, according to the peculiar circumstances of each.

<sup>†</sup> 3 Rep. 81.

(103) Were this the only reason that could be assigned for this enlarged construction of the statute, it should seem to impute not a little absurdity to the legislature; not only in enacting what was already before enacted, but also in reciting, as the only ground of necessity for the new statute, that very mischief alone which is supposed to have been equally well provided against before. But it is to be observed that this statute goes further than either the common law or the 13 Eliz. c. 5.; which did not avoid conveyances if made *bonâ fide*, as well as for a good consideration; whereas the statute here in question, is held to extend, not only to cases of *fraud*, but even to such, where by *laches* or *neglect* merely, the true owner permits the bankrupt to continue in possession under circumstances that create a false credit (Ryall and Rolle, 1 Vez. 365. 369. S. C. 1 Atk. 175, 79, 80. West and Skip, 1 Vez. 243. Copeman and Gallant as reported 7 Vin. 89.).

The



The class of cases, here in question, certainly differs, in many respects, from those of bankrupts keeping possession after conveyances of goods originally their own. In the latter, the mere circumstance of the *possession* furnishes at once a presumption against the transaction, and it is difficult, unless in very special cases, to conceive for what purpose the original owner should be still allowed to continue in possession, except that of gaining a false credit; and the goods having been before in his possession as his own, and disposed of as such, certainly requires some act of notoriety to advertise the rest of the world of a change of the *property*; which would, otherwise, under such circumstances be presumed to be, as it was before, united with the possession". But the occasions of persons placing their property in the hands of others, for the purposes of agency or management, of temporary use, or other inferior interests, are so various and frequent, that unless the possession is accompanied with circumstances of manifest fraud, in the person to whom the property belongs permitting the bankrupt to dispose of it *as* his own; or of a gross negligence in not doing every thing in his power to prevent other persons being deceived by a possession which might otherwise under the circumstances tend to create a false credit; the mere possession of property not originally the bankrupt's own, but moving from others, seems not to

" Ryall and Rolle, 1 Vez. 360. 1 Atk. 168.

afford

BOOK III.  
CHAP. V.  
SECT. III.

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afford any opportunity for any inference of fraud or misconduct, and it has accordingly happened, that by far the greater part of the cases of this class, that have come under discussion, have been determined not to be within the statute.

If for the *express purpose* of supporting a trader's credit, one places goods in his hands, and permits him to dispose of them as his own, there can be no doubt that such a case is within the statute<sup>x</sup> (104).

Or if property is placed in his hands, under such circumstances as must *necessarily* make it appear to the rest of the world to be his own; and the real owner does not take such means as are in his power to prevent other persons, who may enquire into the title, from being deceived by those false appearances, but which by his doing so, might be prevented; this also is within the statute. As in the case of the officer of an East India company's ship<sup>y</sup>, already noticed above<sup>z</sup>; and the circumstances of which it is therefore unnecessary to state

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<sup>x</sup> Anon. cited Style's Reg. tit. Bankt.

<sup>y</sup> Gordon and E. I. Co. 7 T. R. 228.

<sup>z</sup> P. 309.

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(104) A case of this kind does not seem ever to have been put, in all the mootings upon the question of this statute's extending or not to property not originally the bankrupt's; perhaps, because independent of the statute, such a case would have received the same determination. But in the book from which it is here cited, it appears to have been a determination expressly upon this statute.

again

again here, further than to observe that in point of fact in that case, the property in question was not originally the bankrupt's, but another person's, which the officer in consideration of a bill of exchange given him by the owner of the goods, shipped in his the officer's name, and as part of his privilege; and by deed assigned the same and the produce thereof for his own use till the bill should be accepted, and then to the use of the assignee; and in the assignment was contained a power of attorney authorizing the company to receive the money arising by the sale, for the sole use and benefit of the assignee.

But the statute does not extend to goods of which the bankrupt has the possession and disposition, in the capacity of *executor* or other *trustee*. These were, formerly, held to be out of the statute, considering it as restrained by the *preamble* to goods only that were originally the bankrupt's own, and which he had in his own right<sup>a</sup>; but though this construction has been exploded, the statute is still held not to extend to them, upon the ground that in such cases the party does not *permit* or *consent* to the bankrupt's disposing of the goods *as his own*<sup>b</sup> (105).

It

<sup>a</sup> Copeman and Gallant, 1 P. W. 314. L'Apostre and Le Plaisirier, cited ib. 318. Exp.

Marsh, 1 Atk. 159. Ryall and Rolle, 1 Vez. and Atk.

<sup>b</sup> Mace and Caddell, Cowp. 232.

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(105) In Copeman and Gallant, 1 P. W. 314. which was a case of possession by a bankrupt under an assignment made to him



BOOK III.  
CHAP. V.  
SECT. III.

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It does not extend therefore to a possession under a bare *authority to sell* for the principal: whether a special authority in the particular case, or as a *factor* generally<sup>c</sup>; with respect to whom it has been observed<sup>d</sup>, that from the *known* nature of his employment, the possession which by the course of trade he must have of other people's goods, does not hold out a false credit to the world.

The same principle applies with respect to a *banker*<sup>e</sup>; to *tradesmen* who receive goods *to be*

<sup>c</sup> Mace and Caddell, Cowp. 232.

<sup>d</sup> Bryson and Wylie, Pull. and Bos. 84.

<sup>e</sup> Bryson and Wylie, Pull. and Bos. Walker and Burnell, Dougl. 303.

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him in trust to pay the debts of the assignor, Ld. Cowper held it out of the statute, because the assignment was with an *honest intent*, namely to pay the assignor's debts. This reason was by succeeding judges (Ryall and Rolle, 1 Vez. and Atk.) thought not to be sufficient; though the case was held to be rightly decided upon another ground, (now also exploded in its turn) that of the restrained construction of the statute. Perhaps Ld. Cowper's meaning has not been sufficiently expressed in P. Wms. report. That he did not consider an honest intent *generally*, as sufficient to take a case out of the statute, appears by the report of the same case in 7 Vin. 89. By an honest intent, therefore, he probably only meant what has been since more precisely expressed as the ground of determination in such cases (see Mace and Caddell, Cowp. 232. Walker and Burnell, Dougl. 303. and cited in Collins and Forbes, 3 T. R. 316.) namely, that the party does not either through fraud or laches, permit or consent to the bankrupt's selling or disposing of the goods as his own,

*worked*

*worked up* for their employers<sup>f</sup>; and to all persons generally, having possession of the goods of others merely and *bonâ fide* for the purpose of exercising some particular trust or employment with respect to them.

BOOK III.  
CHAP. V.  
SECT. III.

Upon grounds which were thought somewhat similar to this, the following case has been determined<sup>g</sup>: A public board having advertised for carpenters to deliver in proposals for doing the work of a government contract, and supplying the timber for that purpose; some persons, who, as being only general merchants, would not have been permitted to undertake it in their own name, entered into a secret agreement with the bankrupt, who was a carpenter, to supply the timber in his name; and which having been accordingly bought and shipped by them, was delivered to the king's officers upon the account and in the name of the bankrupt, and applied by him in execution of the contract. It appeared that the *king's officers* would not have permitted even the bankrupt to have sold any of the timber, except such as was unfit for the contract, or to dispose of it in any other manner than for the work contracted for, because they considered it as delivered for the purposes of the contract only. The bankruptcy taking place before the contract was completed, the property in the timber was claimed by the merchants. This was

<sup>f</sup> Collins and Forbes, 3 T. R.  
323.

<sup>g</sup> Collins and Forbes, 3 T. R.  
316.

held

BOOK III.  
CHAP. V.  
Sect. III.

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held to be out of the statute, upon the ground that the bankrupt's possession of the property was only for a special purpose, and that he had not the order and disposition of it, except only for the purposes of the contract; and the case was compared to that of tradesmen receiving goods for the purpose of being worked up for those who supply them with the materials (106).

The *possession*, which a *husband*, living with his wife, has of the separate property of the wife, settled in trustees for her separate use, is not sufficient to bring a case within the statute, unless accompanied with other circumstances to shew that

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(106) The cases, however, seem to be materially different. There is a general *notoriety* with respect to the employment of *manufacturers*, which prevents a false credit. In the case cited, the special purpose was not of that kind. The transaction was secret, and a false and pretended ownership set up and studiously maintained.

As to the bankrupt not having had the order and disposition, it may be observed this was only as between the bankrupt and the king's officers, and that this was not inconsistent with the true ownership being in him; but the *real owners* permitted the bankrupt to order and dispose of it *apparently* as *his own*. They permitted him to *pass* as the owner, with the government; and all persons enquiring at the board, would have been informed he was the owner; and by the nature of the transaction, no one else could be taken to be the owner. Though the disposition of the property was *subject* to the contract, yet subject to that, the bankrupt appeared to have the sole interest, and upon that false appearance, might gain a delusive credit.

the



the trustees permitted the husband also to have the *order and disposition* of it. If it is settled upon her to enable her to carry on a separate trade in which the husband is not suffered to intermeddle, it will not be within the statute<sup>h</sup>; but it would, if he carried on the trade in *his* name and obtained credit upon it, or if the trade was carried on by *both*<sup>i</sup> (107).

BOOK III.  
CHAP. V.  
SECT. III.

A woman having upon a second marriage, assigned some household goods, her separate property, to trustees to suffer the husband to enjoy them, on condition of his paying to the trustees, for the use of her children by the first marriage, a sum of money payable by yearly instalments; the trustees allowed the goods to remain in the husband's house, for several years, and after he was in arrear for part of the instalments; and also permitted him to have the possession, order and disposition, and apparent ownership of them, until the very day before he committed an act of bankruptcy. This was held to be a possession by the husband, in his *own right*, as having contracted for the *purchase* of the goods at a certain price, payable by instalments; and that

<sup>h</sup> Haselington and Gill, 3 T. R. 620. Jarman and Woolloton, ib. 618.

<sup>i</sup> See same cases.

(107) Haselington and Gill above cited, was not a case in bankruptcy; but the reasoning upon the question how far a husband's possession of a wife's separate property is or is not fraudulent against creditors, applies equally to cases under this statute.

it

BOOK III.  
CHAP. V.  
SECT. III.

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it was a gross fraud on the part of the trustees, in permitting him to continue in possession so long after failing in his annual payments, and not repossessing themselves until just on the eve of his bankruptcy .

Where a woman having kept a public house, and had a licence, said she was married to a man who lived with her, whose name she afterwards entered in the books of the excise as married, and he had the licence and continued in the possession of the house and goods till his bankruptcy, this was held clearly to be within the statute; the goods being possessed by him emphatically *as his own*, and kept by him as such<sup>1</sup>.

Among the circumstances which may have an effect in any particular case of possession by a bankrupt of goods belonging to other persons, the *nature* of the *property* itself seems in some cases to be material<sup>m</sup>. The possession of *stock and implements of trade*, especially of the same trade which the bankrupt himself carries on, must always afford a strong presumption of ownership, and is generally a principal foundation of the credit he obtains. But with respect to *furniture* in a house; the *use* and the real *ownership* in such things are so well known to be frequently in *different* persons, that the mere *possession* is too equivocal from which to infer a re-

<sup>1</sup> Darby and Smith, 8 T. R. 82.

<sup>m</sup> Mace and Caddell, Cowp.

232.

<sup>m</sup> Walker and Burnell, Dougl. 303. Lingham and Biggs, Pull. and Bos. 88.

putation of ownership, without other evidence of the nature and character of the possession.

BOOK III.  
CHAP. V.  
Sect. III.

In a case already mentioned<sup>1</sup>, with respect to a husband's possession of the separate property of the wife, a distinction was made between the *stock in trade* and the *furniture*; as to the latter of which, the jury found a verdict *against* the assignees, and the rule to set aside the verdict was discharged.

At the same time there can be no doubt that under particular circumstances, *furniture* may come within the statute as well as any other sort of property. Where the bankrupt kept a *coffee-house*, and a creditor, after taking in execution all the household furniture and other articles belonging to the coffee-house, but without removing them, let them again by deed to the bankrupt for a term of years at a certain rent, and who accordingly continued in possession for several years after, till the time of the bankruptcy; the assignees were held to be entitled to the property under this statute<sup>m</sup>: the bankrupt under these circumstances, being in such possession as necessarily to create a reputation of ownership, and consequently a credit founded upon it (108).

On

<sup>1</sup> Jarman and Woolloton,  
<sup>3</sup> T. R.

<sup>m</sup> Lingham and Biggs, Pull.  
and Bos. 82.

(108) With respect to this case, it may also be observed that the *furniture and other articles* belonging to a *coffee-house*, seem to be equivalent to the stock and implements of trade in other cases, as being principal objects of credit. It was a case too



BOOK III.  
CHAP. V.  
Sect. III.

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On the other hand where a bankrupt was allowed by the assignees to continue in possession of his house and furniture; and after obtaining his certificate, engaged in trade, and became a bankrupt again; it was held to be out of the statute, because although he had the *possession*, yet he had not by the *permission* or *consent* of the assignees (the true owners), any *disposition* of the goods<sup>a</sup>: for it appeared that he was continued in the house only as an agent for the assignees, in getting in his effects and settling his affairs; that the goods were inserted in every account between the assignees and the bankrupt; and that it was *generally known* that the furniture of the house belonged not to him, but to the assignees.

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<sup>a</sup> Walker and Burnell, Dougl. 303. S. C. cited in Collins and Forbes, 3 T. R. 316.

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of a creditor by *execution*, as to which Ld. Hardwicke said (West and Skip, 1 Vez. 245.), that a creditor by execution, suffering the goods to remain in the possession of the debtor was stronger than any other, to presume consent or laches.

## CHAP. VI.

*Of the Examination  
of the Bankrupt, and Others.*BOOK III.  
CHAP. VI.

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**I**N the order of the proceedings in a commission, some of the subjects of the present chapter might perhaps have found a place in a former part of this work ; but as they could only have been partially considered there, and it would have been inconvenient to the reader to have had the different parts, of a subject of no great extent, scattered under different titles ; I thought it better to reserve for this place the whole of what relates to *the commissioners' powers of examination and enquiry* generally ; whether upon what is commonly called the bankrupt's *last* examination, or at any other time, or of any other persons ; and whether for the discovery of *property*, or for other purposes. In this chapter, therefore, I shall consider, 1. What *Persons* the commissioners may examine. 2. The *Form* of their examination. 3. The *Subjects* to which they may severally be examined. 4. Certain provisions for *better Enabling* as well the bankrupt to make, as the assignees to obtain, a full Discovery. 5. The Commissioners' Powers in cases of *Contumacy* or *Non-conformity* : and herein of the *Grounds* and *Form* of their *Commitments*. And lastly, The *Proceedings at Law* in cases of such *Contumacy* or *Non-conformity*.

*What Persons the commissioners may examine.*

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13 *Eliz. c. 7. s. 2. 5.*1 *Ja. c. 15. s. 6, 7. 10.*21 *Ja. c. 19. s. 5. 6.*5 *Geo. 2. c. 30. s. 1. 16. 21.*

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The statute of *Eliz.* makes no mention of any *examination* of the *bankrupt*; and the only authority of the commissioners, if any, under that statute, for that purpose, must have been considered as incident to the general power with which it invests them of taking order and direction with his person, by their discretions. If they either had or exercised the power of examination, it appears from the recital of the 1 *Ja.* that their authority for it was not considered as sufficiently full or explicit, and this statute was the first which, in direct terms, gave them a power of *examining* the *bankrupt* himself. Since that time, however, this examination has become, whether considered with a view to the benefit of the creditors, or in its consequences to the *bankrupt* himself, by far the most important of all the examinations that are taken under a commission.

With respect to the *wife* of the *bankrupt*, as she could not, at common law, be a witness either for  
or



or against her husband, the commissioners could not examine her at all<sup>o</sup>; but this being extremely injurious to creditors, as she, from her situation, was naturally to be supposed a principal agent in the secret dispositions of her husband's property, it was thought necessary by the 21 Ja. to subject her also, to examination (109).

BOOK III.  
CHAP. VI.  
SECT. I.

The only *other* persons, for whose examination, any express provision was made by the older statutes, were such as were indebted or suspected to be indebted to the bankrupt, or persons actually detaining or suspected of detaining or having in their possession, any property belonging to him: but by the 5 Geo. 2. the commissioners have now a full and general authority, to examine *all and every person* whatever, summoned before, or present at, any meeting under the commission.

#### SECT. II.

##### *Form of the Examination.*

1 Ja. c. 15. s. 7.

5 Geo. 2. c. 30. s. 16.

In general, where the statutes have given a power to examine, they have at the same time directed

<sup>o</sup> Anon. Brownl. 47. Exp. James, 1 P. W. 610.

(109) For the *subjects* to which she may or may not be examined, since this statute, see below sect. III.

the examination to be *upon oath* : and the omission of such a direction in the 13 Eliz. with respect to the bankrupt himself, was afterwards supplied by the statute of James.

By this statute, the examination of the bankrupt was also directed to be by *Interrogatories* ; that is, by questions reduced into writing : which, it was formerly held, ought to be tendered to the bankrupt ready drawn, and time given him to consider them, and to prepare his answer<sup>p</sup>. But now by the 5 Geo. 2. the commissioners are empowered to examine the bankrupt and all other persons, as well by *word of mouth* as on *interrogatories in writing*.

As since this latter statute, it is in the discretion of the commissioners to examine in the one way or the other ; as to which they must of course be governed by the particular circumstances of the case ; so an application to the court of Chancery, by a witness, for an order to be examined upon interrogatories, has been refused in a case where the questions, which the witness apprehended might otherwise be put to him, appeared to be trifling and immaterial ; and Ld. Hardwicke said he would not presume, that commissioners would ask such trifling and immaterial questions ; and therefore would not order the examination to be upon interrogatories.

<sup>p</sup> Gregory's case, 5 Mod. 368. R. and Nathan, Str. 880.

By the same statute, all persons examined by the commissioners must, if required, *sign* and subscribe their examination, when it is taken down and reduced into writing; unless they have a reasonable objection either to the wording thereof or otherwise, and of which the commissioners are to judge.

BOOK III.  
CHAP. VI.  
SECT. II.

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Most of the examinations taken by commissioners are necessarily *ex parte*; and even where they are not necessarily so, I apprehend it is a matter of discretion in them to admit or not, other persons interested in the subject of examination, to cross-examine. With respect to the admission of *counsel*, for this purpose, or to attend the party himself that is under examination; it seems to be upon the same footing; and in a case<sup>1</sup> where even the examination was directed to be restrained to particular points only, Ld. Hardwicke refused to make an *order* that the witness should be at liberty to be attended by counsel upon the examination; for the inconvenience of the precedent; and only recommended it to the commissioners, in the particular instance, to indulge the party with counsel.

<sup>1</sup> Exp. Parsons, 1 Atk. 72. 204.



*Of the Subjects to which the commissioners may examine.*

1 *Ja. c. 15. s. 7. 10.*

21 *Ja. c. 19. s. 5, 6, 7. 9.*

5 *Geo. 2. c. 30. s. 1. 4. 16. 21.*

1. *With respect to the Bankrupt.*

By the statutes of James, the commissioners may examine the bankrupt touching his property of every kind, securities, and books of account; and *such other* things as may *tend* to disclose his estate, or secret grants and conveyances for the purpose of hindering the execution of the statutes, or of defrauding his creditors; and he is required to disclose upon his examination, and (if it lie in his power), to deliver up to the commissioners all such estate and effects so fraudulently conveyed, or kept, or detained by him or by his means.

The 5 Geo. 2., with still more minuteness, requires him to discover all his estate and effects, and how, and to whom, and upon what consideration, and at what time, he has disposed of every part of it, and all books, papers, and writings relative thereto, of which he was possessed, or in which he was any ways interested, or which any  
other

other person had in trust for him, or to his use, at *any time before or after* the issuing of the commission; or whereby he, or his family, have or may expect any profit, possibility of profit, benefit, or advantage whatsoever: except only such part of his estate and effects as shall have been really and *bonâ fide* sold or disposed of in the way of his trade and dealings, and also such sums of money as shall have been laid out in the *ordinary* expences of his family (110). And he is required, upon such examination, to deliver up to the commissioners all his effects, (except his necessary wearing apparel, and that of his wife and children), and all books, papers, and writings relating thereto, as at the time of his examination shall be in his possession, custody, or power.

The several clauses of these statutes, so minutely specifying so many various particulars of discovery

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(110) There seems to be some inaccuracy here, with respect to the first part of this exception, if considered, as it is expressed in the statute, to be an exception, merely as to *discovery*. The meaning of the latter part of the exception is obvious; that a general account of the gross sums, laid out in family expences, is sufficient, without its being necessary to go into the particular items. But to dispense with *discovery* of such part of his estate and effects, as shall have been *sold* in the way of *trade*, seems to me unintelligible in itself, and inconsistent with the principal clause. This exception is to be found only and for the first time in the 5 G. 2. and is not the only instance of a variation, without improvement, from the statute of the 5th of G. 1.

and

BOOK III.  
CHAP. VI.  
Sect. III.

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and enquiry, may serve to manifest the anxiety of the legislature, that every thing whatever that can throw light upon his estate, and his transactions with respect to it, should be the subject of a *personal* examination and disclosure of the bankrupt himself: but the *whole*, that a bankrupt may be examined to, may be summed up at once in a single sentence contained in the last of the statutes; namely, that in which the commissioners are empowered to examine him "touching *all* matters relating to his trade, dealings, estate, and effects."

2. *With respect to Others.*

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13 *Eliz. c. 7. s. 5.*

1 *Ja. c. 15. s. 10.*

21 *Ja. c. 19. s. 5, 6, 7, 9, 10.*

5 *Geo. 2. c. 30. s. 16, 20, 21.*

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With respect to others, as with respect to the bankrupt himself, there are many very special and minute provisions for examination in certain cases; particularly in that of persons suspected of concealing or detaining any part of the bankrupt's property.

These may be examined as to all goods and chattels supposed or suspected to be in their custody, use, occupation, or possession; or debts supposed or suspected to be owing by them to the bankrupt; and to any lands, goods, chattels, or debts which



which they are known, supposed, or suspected to have or detain, or to be indebted, to or for the benefit of the bankrupt.

BOOK III.  
CHAP. VI.  
Sect. III.

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The wife also of the bankrupt may be examined for the finding out and discovery of his estate and effects concealed, kept, or disposed of by her in her own person, or by her own act and means, or by any other person.

So all persons accepting of any secret trust, to conceal or protect any of his estate, real or personal, from the creditors, are required to discover it, and to submit themselves to be examined for that purpose by the commissioners. . And as an inducement to persons acquainted with any concealments of the bankrupt's property, to come forward, an allowance of *5 per Cent.* and such further or other reward as the assignees and creditors shall think fit, out of the property discovered, is held out to every person who at any time after the time allowed for the bankrupt's surrender and conformity, shall *voluntarily* come and make discovery to the assignees or commissioners of any part of the bankrupt's estate, not before come to the knowledge of the assignees.

With respect to the power of examining as to the truth of debts claimed against the bankrupt, or to be proved under his commission; or as to fraudulent demands by any pretended accountant to the king, I have already noticed these in another place.

Notwith-

BOOK III.  
CHAP. VI.  
Sect. III.

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Notwithstanding all these special provisions, it has been thought necessary in the 5 Geo. 2. after giving the commissioners a power to examine the bankrupt himself as to all matters relating to his property, his trade and dealings, also to invest them, by one sweeping clause, with a general authority to examine *all other* persons touching *all* matters relating to the *person, trade, dealings, estate, and effects* of, and any *act* or *acts* of *bankruptcy* committed by, the bankrupt.

There are, as might naturally be expected, under statutes giving such large powers of examination and enquiry, but few cases that have occurred, in which any objection has been taken upon the ground of the *subjects* of examination; and still fewer in which any such objections have prevailed.

It was formerly held<sup>r</sup>, upon the statute of the 1 Ja. that a person suspected of detaining the bankrupt's effects, and who had, before the commission issued, obtained some effects, in discharge of his own debt, from the bankrupt, was not bound to answer whether any of the bankrupt's estate had come to his hands *before* the issuing of the commission; and that it was sufficient to swear generally, that he had none of the bankrupt's estate in his hands. But this has been since overruled, and it has been held, that a witness is bound to give an account of what he knew of the bankrupt's effects,

<sup>r</sup> Jeakil's case, 3 Keb. 837.

as well *before* as after the bankruptcy<sup>1</sup>; for it *tends* to the discovery of the bankrupt's property at the time he became bankrupt. And with respect to the bankrupt himself, the 5 Geo. 2. requires him to discover, how he has disposed of his property at *any time before or after* the issuing of the commission.

Upon the general rule of law, that a man is not bound to accuse himself, it has been laid down<sup>2</sup>, that no person examined before commissioners is to answer any thing *criminal*; and therefore that a witness was not bound to answer, how he had assisted in *embezzling* the bankrupt's estate; for that it was criminal to embezzle any goods *after* the bankruptcy, but not before. But however unexceptionable this general rule may be, it certainly did not apply to the particular case in question; as to which it appears, from a better report of the case<sup>3</sup>, to have been determined, that he ought to answer: for upon view of the statute, the penalty (of forfeiture of the double value<sup>4</sup>), is incurred, by *not* discovering what he knows; and therefore if he answers that he did assist in embezzling the goods, and *discovers* how they have been disposed of, he thereby avoids the penalty.

The rule itself, however, seems to be subject, in cases of bankruptcy, to considerable limitations.

<sup>1</sup> Bracy's case, Ld. Raym. 99.

<sup>2</sup> Bracy's case, Comb. 390.

<sup>3</sup> Ld. Raym. 99.

<sup>4</sup> 13 Elz. c. 7. s. 6.



BOOK III.  
CHAP. VI.  
S. & III.

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For though an act of bankruptcy is in most cases considered as a *crime*, and the bankrupt himself described and treated, in the older statutes, as an *offender*, and therefore, as it should seem, ought not to be examined *directly* touching any *act of bankruptcy* committed by him; and which might be confirmed, if such a position required it, by observing upon the remarkable difference of the clauses in the 5 Geo. 2. with respect to the powers of examination given to commissioners in the different cases of the examination of the bankrupt himself, and of that of all other persons: yet it appears by the statutes of James, that the bankrupt *may* be examined as to secret grants and *conveyances* of his *property* made to defraud creditors; which, by the same statutes, are acts of bankruptcy in themselves.

The rule, therefore, in question, seems to be subject to the following limitations: The bankrupt, if he may not in any case be examined *directly* to an act of bankruptcy, may be examined to such things as may *tend to disclose* his *property*, though they should involve a discovery of an act or acts of bankruptcy.

And he may also be examined to all matters relating to his estate and dealings, though the discovery may subject him to *penalties*, independent of the bankrupt laws. If a *clergyman* will trade, or a person deal only in *smuggling* and running of goods, there is no examination with respect to the  
property

property of such persons, and their transactions in relation to it, but will subject them to penalties; but Ld. Hardwicke thought that in such cases<sup>1</sup>, that was no reason why the commission should not proceed.

BOOK III.  
CHAP. VI.  
SECT. III.

According to another general rule of law, (or rather a particular application of the same), that a *wife* cannot be a witness against her husband, it has been laid down<sup>2</sup>, that she cannot be examined against her husband touching his *bankruptcy*; and that the 21 Ja. which authorizes the commissioners to examine the wife, relates only to her husband's *estate*. At the same time it is hardly necessary to remark, that the same observation, which was made above with respect to the case of an examination of the bankrupt himself, to acts of bankruptcy, seems to apply equally to the case of the wife; with respect to whom, if she may not be examined directly to an act of bankruptcy for the purpose of establishing it, there seems to be no reason why she should not equally with the bankrupt himself be examined as to all matters tending to disclose his *property*, though they should involve a discovery also of acts of bankruptcy (111).

Though

<sup>1</sup> Exp. Meymott, 1 Atk. 196.

<sup>2</sup> Exp. James, 1 P. W. 610.

(111) In the case exp. James cited above, Ld. Macclesfield said that *till* the late statute (meaning the 5 Geo. 1. c. 24.), the commissioners could not examine the bankrupt himself,

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touching

BOOK III.  
CHAP. VI.  
SECT. III.

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Though commissioners, in the ordinary exercise of their authority, are subject to so few restrictions in their powers of examination and enquiry, yet the Ld. Chancellor may, and does sometimes by order restrain their examinations to particular points<sup>a</sup>; but Ld. Hardwicke expressed some reluctance to grant such an order, as, he said, yielding to applications of that kind would be attended with inconvenience and expence<sup>b</sup>.

But the commissioners, where not restrained by any order of that kind, are by their duty, as well to the public, as to the creditors of the bankrupt, bound to examine the bankrupt fully, not only for a discovery of his property, but also as to his conduct and behaviour in all his dealings with respect to it; and it would be a breach of their duty, to stop or forbear from an examination which if proceeded in, might throw light upon his affairs, or his behaviour towards his creditors. Upon these grounds it has been determined<sup>c</sup>, that an agree-

<sup>a</sup> Exp. Parsons, 1 Atk. 204.

<sup>b</sup> Exp. Bland, *ibid.* 205.

<sup>c</sup> Nerot and Wallace, 3 T. R. 17.

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touching acts of bankruptcy; and that there is no clause in it enabling them to examine the *wife* against her husband. But the wife's privilege or disability is generally considered as that of the husband himself, upon the technical ground of the union of person: and if that statute had enabled the commissioners to examine the one, it must, it should seem, equally have extended to the other. But *Qu.* Whether *that* statute gives any such power with respect to the bankrupt himself, further than as incident to the discovery of his estate.

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ment by a friend of the bankrupt to pay a sum of money to the assignees, in consideration that the *assignees* would forbear to proceed in the examination of the bankrupt then about to be taken before the commissioners, with respect to certain sums of money for which the bankrupt had not accounted, and that the *commissioners* would forbear and desist from taking his examination to these points, was void; as being contrary to the objects and policy of the bankrupt laws. And it was held that no collusion of the *assignees* could deprive the *creditors at large* of the right of examination; that the assignees, on the other hand, could not controul the discretion of the commissioners, who could not consistently with their duty, have acceded to any such agreement, if it had been proposed to them; and that even if all the creditors had consented, it would not have made it good, for that the public, as well as the bankrupt's own creditors are interested in the commissioners fully examining into the conduct, as well as the estate of the bankrupt, and in their not allowing him, without a full examination and inquiry into the circumstances which by the particular provisions of the statute may affect it, that certificate, under which he might again obtain credit with the public, as a man whose former insolvency had proceeded only from losses and unavoidable misfortunes.

But a covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration

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that

BOOK III.  
CHAP. VI.  
Sect. III.

that they will not proceed any further under the commission, and will join in an application to have the same *superfeded*, is not illegal or contrary to the policy of the bankrupt laws<sup>d</sup>. This case was held to be very distinguishable from the former, in which the consideration of the promise was the *suppression* of the bankrupt's *examination*, that he might obtain his certificate without a disclosure; but where, as in this case, all the creditors were to receive their whole debts (by which the commission would in effect be at an end), it would be monstrous to say that the bankrupt's estate should be torn in pieces by the expence of a commission.

#### SECT. IV.

*Of certain provisions for better enabling, as well the Bankrupt to make, as the Assignees to obtain a full Discovery.*

Almost every regulation in the statutes of Eliz. and James the first, seems to have been conceived in a spirit of the utmost jealousy and harshness towards the bankrupt. He was allowed no indulgence in respect of *time*; no privilege of his *person* from arrest; no right of *access* to his *books and accounts* in the possession of the commissioners or assignees; and no future *allowance* out of his estate, or any *discharge* from his debts: either to

<sup>d</sup> Kaye and Bolton, 6 T. R. 134.

induce him to an early submission; to enable him to prepare and go through his examination; or to hold out to him the prospect of any adequate advantage from a fair and complete discovery.

The modern statutes proceed upon totally opposite principles, in all these respects: 1st, in allowing him a considerable length of time for surrendering to his commission; 2dly, in affording him, from the moment he does come in, a protection against arrests by his creditors, until he has finished his examination; 3dly, in giving him a right to inspect his books and papers, in order to assist him in making a full and true discovery; and lastly, in rewarding his conformity, by a release from his debts, and an allowance out of his estate. The three former only, properly belong to our present subject, the bankrupt's Examination: the latter will make the subject of two succeeding chapters.

1. *As to the Time limited for his Surrender, and Submission to be Examined.*

5 Geo. 2. c. 30. s. 1, 2, 3.

When the party is declared a bankrupt, and notice thereof in writing has been left at his usual place of abode, or personally served in case he is in prison, and notice in the gazette of the issuing of the commission, and time and place of meeting of the commissioners, he is allowed forty-two days,

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within



BOOK III.  
CHAP. VI.  
Sect. IV.

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within which to surrender himself and submit to be examined from time to time. And the commissioners are particularly directed to appoint not less than three several meetings for that and the other purposes mentioned in the act, the last of which meetings shall be on the forty-second day limited for the bankrupt's appearance.

But the Chancellor is empowered also to enlarge the time for the bankrupt's surrender, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days.

Although the bankrupt, by a surrender on the forty-second day, or the day to which it is enlarged, will save the penalty of the statute, though he may not have surrendered at any of the previous meetings; and is seldom expected or required to make a *complete* discovery before that time; yet it is unquestionably his duty, as well as his interest, to appear as early as possible, either at the previous public meetings, or at any private meeting of the commissioners of which he has notice; and to assist the commissioners and assignees in discovering his property, and ascertaining the state of his affairs.

And if at any time between his being declared a bankrupt and the times appointed for his public surrender, the commissioners think it necessary, for the benefit of the creditors, to examine him; especially where they have information of his intention to embezzle his effects, and withdraw him-

self

self from the commission; they may summon him before them for that purpose in the intermediate time, and examine him, at their discretion\*. This power of examination in the intermediate time, is founded not only upon the obvious reasonableness and necessity of the thing, as otherwise the allowance of the forty-two days might operate only as a protection to fraud; but also upon the authority of the older statutes, under which, though the power of *immediate seizure* and *imprisonment* has been impliedly taken away by the regulations of subsequent statutes, yet the general power of examining still remains. And though the 5 Geo. 2. does not *directly* authorize such intermediate examinations, yet it may plainly be inferred, from some other provisions of that statute, which empower any of the judges, upon a certificate from the commissioners, to issue their warrant for apprehending the bankrupt and committing him to prison till removed by the commissioners in order to be examined; and which enact that any bankrupt who within the times appointed for his surrender, is so apprehended, and *submits* to be examined, shall have the benefit of the act as if he had *voluntarily* come in and surrendered.

As the commissioners are not restrained from examination in the intermediate times, neither is their power limited only to the forty-two days, or the enlarged time. The surrender within the

\* Exp. Lingood, 1 Atk. 240.

BOOK III.  
CHAP. VI.  
SECT. IV.

limited time, and submitting himself to be examined, is material to the bankrupt himself, as it will save his felony; but it may sometimes, from the lateness of his surrender or other circumstances, be impossible for him to *finish* his examination within the limited time; nor does the act require that it should be so: and the commissioners may adjourn his examination and compel him to make further answer, after that time, and until he has made full answer to their satisfaction <sup>f</sup>.

The case here cited; in which this doctrine was laid down, as to the commissioners' power of subsequent examination after the time given to the bankrupt to come in, and which was supported upon the same grounds as the power of intermediate examination, namely, that of the reasonableness and necessity of it, and also the authority of the older statutes (112); was a case, in which either there had been no examination at all upon the forty-second day, or at least it had not been then finished. But I believe there is no case in which there has been any determination upon the commissioners' power of subsequent examination

<sup>f</sup> Perrot's case, Burr. 1122.

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(112) It may be observed also that the clause of the 5 Geo. 2. with respect to the bankrupt's surrender at any of the meetings appointed in the gazette, requires him not merely to surrender, but to submit to be examined *from time to time*; and this applies to the surrender on the *last day*, as well as to any previous meeting.

of



of a bankrupt, *after* having *passed*, as it is usually called, his *Last* examination (113).

BOOK III.  
CHAP. VI.  
SECT. IV.

(113) Mr. Cooke, seems (Co. B. L. 464, 5.), to consider Perrot's case as an authority for the power of subsequent examination, even after the bankrupt has *passed* his *last* examination. Notwithstanding, however, my respect for that gentleman's accuracy, and the high estimation in which, in common with the rest of the profession, I hold his very valuable work, I am inclined to think that he has in this instance drawn an inference from this case which it will not bear. The *facts* of the case did not raise such a question, nor does the language of the report seem to me to warrant such a conclusion; for though the judges speak of the last examination, it is plainly in the lax sense of an examination upon the last *day* of the limited time; and not of a *last* examination, in the sense of an examination *passed*, that is, finished: and which certainly was not the case then in question.

The 5 Geo. 2. does not seem to have had in contemplation the necessity of a bankrupt being amenable to examination by the commissioners, after having once passed what is usually called his last examination, to their satisfaction, otherwise it would probably have made some provision for extending the time of his privilege from arrest, but which at present is limited only to the forty-two days, or the enlarged time allowed for *finishing* his examination. At the same time, it should seem, there would be a great defect of justice, if not an absurdity, if he should not be amenable to further examination in order to explain circumstances coming to light afterwards, which might demand a further enquiry than was thought or could be foreseen to be necessary at the time of his last examination. Such subsequent examination, it is true, might contradict his last examination, and tend to a discovery of property which he had before concealed; but would he not save the felony by a fair discovery, even upon such subsequent examination?

BOOK III.  
CHAP. VI.  
Sect. IV.

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The Lord Chancellor's power of enlarging the time for the bankrupt's surrender, is confined to the fifty days after the end of the forty-two; and, if after the bankrupt has failed to surrender at the appointed day, the fifty days elapse, the Lord Chancellor cannot enlarge the time, so that the bankrupt can have any benefit from it as to saving the felony. But he may make an order for the commissioners to take his examination<sup>g</sup>; and will make an order for taking the bankrupt's examination, in any case where either the bankrupt himself, by an innocent default, has neglected to surrender<sup>h</sup>, or where, from the absence of commissioners, his surrender could not be taken<sup>i</sup>: but not where his default has been wilful<sup>k</sup>.

2. *With respect to his Privilege from Arrest.*

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5 Geo. 2. c. 30. s. 5.

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The bankrupt shall be free from all *arrests, restraint, or imprisonment* of any of his *creditors*, in *coming* to surrender; and *from* his actual surrender to the commissioners, *for and during* the forty-two days, or the further time allowed for finishing his examination; provided he was not already in custody at the time of his surrender and submission. And if he is arrested for *debt*, or

<sup>g</sup> Exp. Rodgers, Ambler. 307.

<sup>k</sup> Exp. Smith, Co. B. L. 466.

<sup>h</sup> Exp. Bould, 2 Bro. 49.

Exp. White, 2 Bro. 47.

<sup>i</sup> Exp. Grey, 1 Vez. J. 195.

on any *escape* warrant, *coming* to surrender; or if *after* his surrender, he is so arrested within the time before mentioned, then on producing the notice or summons under the hands of the commissioners or *assignees*, and making it appear to the officer that such notice is signed by the commissioners or *assignees*, and giving him a copy, he shall be immediately discharged: with a heavy penalty upon the officer if he detains him.

This privilege is not to be considered as a general protection to bankrupts who wilfully withhold themselves from their creditors and the commissioners, till the very last day appointed for their surrender, but is intended only as an inducement, and to enable them to make as early a surrender and submission as possible. It is limited, therefore, in the first instance, to their *coming on purpose* to surrender; and does not become a general privilege for the remaining forty-two days, or enlarged time, *until* their *actual* surrender and submission to the commissioners<sup>1</sup>.

The bankrupt, however, must be allowed a *reasonable time* for executing his intention to surrender. If a bankrupt, therefore, is abroad, and upon his return with an intention to surrender, is arrested on his landing, or within a day or two after, and before *he can conveniently* make his surrender, he will be entitled to his discharge; because in fact he is *on his way* to surrender<sup>m</sup>. But if he is arrested, not only before an actual sur-

<sup>1</sup> Kenyon and Solomon, Cowp. 156.

<sup>m</sup> S. C. ib.

render,



BOOK III.  
CHAP. VI.  
SECT. IV.

render, but at a time when it appears he had no *intention* to surrender till the last moment of his time, he will not be within the privilege of being free from arrests, in coming to surrender<sup>n</sup>.

Where a bankrupt, within the forty-two days, but before receiving any summons from the commissioners, delivered to the messenger his keys and effects, and promised to submit to the commissioners; and was afterwards arrested at his house on the first day appointed for his surrender, and about an hour after he had been served with the commissioners summons; Ld. Chancellor King is said to have held<sup>o</sup> that what the bankrupt had done under the circumstances, being all he could then do, was a compliance within the act, and he discharged the bankrupt (114).

Although the Ld. Chancellor alone can enlarge the time for the bankrupt's surrender, before he has surrendered at all; yet after he *has surrendered* to the commissioners, they may enlarge the time for taking his last examination, and he will be privileged from arrest, within the time so enlarged by the commissioners<sup>p</sup>.

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<sup>n</sup> S. C. *ibid*.

<sup>p</sup> Davis and Trotter, 8 T.

<sup>o</sup> Exp. De Fries, Dav. Bankt. R. 475.  
Law 163.

(114) But dissuaded from suing the officer for the penalty, and the order was made by consent.

At the private meeting for opening a commission, the commissioners are often asked, after having declared the person a bankrupt,

The arrests, to which this privilege extends, mentioned in the statute, are arrests by *creditors* for

BOOK III.  
CHAP. VI.  
SECT. IV.

bankrupt, to issue their summons, and take the bankrupt's submission at the same meeting. There seems to be no reason why they should not, (and I believe it is seldom refused), though doubts are entertained as to how far it may avail the bankrupt as a protection.

By the first section of the act, he is required to surrender, after notice *in the gazette* of the issuing of the commission, and of the time and place of a meeting; which clearly can relate only to a *public* meeting. By the second section, the commissioners are directed to appoint *three* several meetings *for the purposes* mentioned in the act; and one of those purposes is the bankrupt's surrender. The sixth section (which relates to the ease of his being in prison) says, that if he is willing to surrender, &c. according to the directions of the act, and can be brought before the commissioners *and creditors* for that purpose, then he shall be brought up, &c. This can only mean a *public* meeting, of which *the creditors* generally, have notice. From this language in the act, it might seem that the legislature had intended, and perhaps it may be thought the policy of the bankrupt law requires that the surrender which should entitle a bankrupt to protection, should be a *public* surrender, in presence of his *creditors*, at a meeting publicly advertised in the London gazette.

But on the other hand it may be observed, 1. That the earliest possible surrender and submission, attended with its consequent protection which the statute holds out as an *inducement* to it, is often of the highest importance to the creditors, even before it is possible to have a public meeting or examination. 2. The statute allows him the privilege in question, in coming to surrender, and from his actual surrender, *for and during the forty-two days, &c.* But if it were not to commence in the one case, till

BOOK III.  
CHAP. VI.  
Sect. IV.

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for *debt*, or on any *escape* warrant; and an arrest under an *attachment* for a *contempt* in not paying money, under an award made a rule of court, has been held to be within the meaning of the statute <sup>P</sup>; considering it as within the analogy of those cases, in which attachments to enforce the payment of a *debt* have been distinguished from attachments merely *criminal*, or to compel the performance of a *duty* (115).

<sup>P</sup> Exp. Parker, 3 Vez. J. 554.

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till from notice *in the gazette*, nor in the other, till from a public meeting which had been advertised in the gazette, he would in most cases have less, and in some cases considerably less than the forty-two days. Lastly, he is *amenable* to examination in the *intermediate* time, before any of the public meetings, and is compellable to attend; and such compulsory submission in the *intermediate* time, was held by Ld. Hardwicke to be within the act, which entitles him to the same benefit from a compulsory submission, as if he had voluntarily surrendered. But if such *compulsory* submission in the *intermediate* time, is to be held equivalent to a *surrender within the act*, it should seem it could hardly be contended that a *voluntary* submission within the *intermediate* time, ought not equally to avail him. The question of the effect of a surrender at a private or a public meeting, has no relation to any question as to what surrender will save the *felony* of the statute. If he wilfully fails to surrender on the *forty-second* or *enlarged day*, he would equally incur the felony, though he should have surrendered at any of the previous *public* meetings, as he would, though he should have surrendered only at the private meeting.

(115) See above, p. 31. 33. 36.

But



But the statute expressly excepts the case where the bankrupt is already *in custody*, before coming to surrender. And therefore *bail's* taking the bankrupt to surrender him in discharge of themselves, is no contravention of the act; for the principal is considered as being in the *custody* of the bail, who are his *gaolers*, and may surrender him when they please<sup>q</sup> (116).

Subject to the particular exception of where he is already *in custody*, the statute extends to all cases; even to an arrest by a creditor who could not come in under the commission, as where it is for a *contingent* debt accruing subsequent to the bankruptcy<sup>r</sup>.

But the *crown* being not within the statutes of bankruptcy, he cannot be discharged from a commitment under an extent of the crown<sup>s</sup> (117).

<sup>q</sup> Exp. Gibbons, 1 Atk. 238.  
Darby and Baughan, 5 T. R.  
209.

<sup>r</sup> Darby and Baughan, *ibid*.  
<sup>s</sup> Exp. Dicke, cited Bl. 1142.

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(116) In the case cited above from Atk. the bankrupt was taken away while *under actual examination* before the commissioners on the forty-second day. Ld. Hardwicke does not particularly observe upon this circumstance, but said generally, that he did not know that the bail's taking the principal *coming* to a *court of justice* to be examined, had ever been determined as a contempt, *provided they brought him to be examined*.

(117) In this case, the bankrupt appears to have been *under examination*.

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BOOK III.  
CHAP. VI.  
SECT. IV.

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When the bankrupt has surrendered, and *finished* his last examination, the purposes for which the privilege was given, being answered, his protection ceases (118). The statute makes no express provision for his attendance upon the *commissioners* after that time<sup>t</sup>; and though it requires him, in one clause (sect. 4.), *at all times* after his surrender to attend the *assignees*, upon notice in writing, to assist them in making out the accounts; yet the subsequent clause, which gives the privilege in question of being free from arrests in coming to surrender, and from the actual surrender, *for and during the forty-two days or the further time allowed for finishing his examination*, has been considered as confining it to the *forty-two* days or *enlarged* time at most. And upon this ground, Ld. Hardwicke, in a case where the bankrupt refused to attend the assignees after the forty-two days, unless upon the terms of signing his certificate; would not make an order upon the bankrupt to attend, unless the assignees would undertake for the cre-

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<sup>t</sup> Marlow and Forbes, 7 Mod. 357.

(118) Unless perhaps, while on his return from examination. This *seems* to have been the case in exp. Parker, 3 Vez. J. 554. And see Hinchefman's ca. Green, 441. The terms of the provision in the 5 Geo. 1. c. 24. with respect to the bankrupt's privilege, were minute and precise; namely, that he should not be liable to any arrest for debt or escape warrant, in *going to, staying with, or coming from* the commissioners, in case of his attending in obedience to *any* notice or summons from them.

ditors

ditors seeking relief under the commission, or obtain their consent, that they would not arrest him <sup>u</sup>.

BOOK III.  
CHAP. VI.  
SECT. IV.

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3. *With respect to his access to books and papers.*

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5 Geo. 2. c. 30. s. 4, 5.

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After his surrender, the bankrupt is at liberty at all seasonable times before the expiration of the forty-two days or the enlarged time, to inspect his books, papers, and writings, in the presence of the assignees, or some person appointed by them; and to take with him for his assistance, such persons as he shall think fit, not exceeding two at any one time; and to make such extracts and copies as he shall think fit, the better to enable him to make a full and true discovery of his estate and effects.

This, together with the other provisions already mentioned, seem to be all that may be considered as more immediately for the advantage of the bankrupt; the following are such as seem to have been intended rather for the benefit of the assignees and creditors; though every regulation which tends to make the discovery more compleat, or the examination more satisfactory, certainly contributes to the mutual benefit of both.

<sup>u</sup> Exp. Turner, 1 Atk. 148.



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5 Geo. 2. c. 30. s. 4, 5, 6. 19. 36.

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Besides the benefit which the creditors may derive from the examination of the bankrupt, at all times, before the commissioners; he is bound also, at all times after his surrender, to attend the *assignees*, upon notice in writing, to assist them in making out his accounts. The assignees may also in the meantime, and before his last examination, require him to deliver up to them, upon oath before a master in Chancery or justice of the peace, all his books of accounts, papers, and writings, not before seized or delivered up, and then in his custody or power; and to discover such as are in the custody or power of any other persons (119).

If the bankrupt is *in custody* at the time of issuing the commission, and *can* be brought before the commissioners, he is to be brought before them in custody; but if he is *in execution*, or *cannot* be brought before them, the commissioners must *attend him* in prison from time to time, and

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(119) This clause seems to be of little use; unless perhaps where the commissioners may happen to be at a distance, or where, from any other cause, they cannot conveniently meet. There is no authority given to the master, &c. to bring the bankrupt before him; or any direction, as to the assignees giving the bankrupt notice for that purpose.

take

take his examination. In that case, the assignees may appoint one or more persons to attend him from time to time, and to produce to him his books, &c. In order to prepare his last examination; a *copy* of which, he must, upon their application for it, deliver to the assignees or their order, *ten days* at least before such last examination. And any creditor having proved his debt under the commission, and producing the commissioners' certificate to that effect, to the keeper of the prison, has a right to be admitted to see the bankrupt.

BOOK III.  
CHAP. VI.  
Sect. IV.

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Even after the bankrupt has obtained his *certificate*, he is obliged to attend the *assignees*, upon notice in writing, to assist them in adjusting or settling accounts between his estate and any other persons; or to attend a court of record, to be examined respecting them; or for *such other business* as the assignees shall judge necessary, for getting in his estate.

## SECT. V.

*Of the Commissioners' powers, in cases of Contumacy or Non-conformity; and herein, of the Grounds and Form of their Commitments.*

13 *Eliz. c. 7. f. 2.*

1 *Ja. c. 15. f. 6. 8. 10.*

21 *Ja. c. 19. f. 5. 6. 8.*

5 *Geo. 2. c. 30. f. 14—18. 36.*

The general mode, by which the statutes empower commissioners to enforce their authority, in the several cases to which their authority extends, is by *commitment* of the party, to such prison as they shall think proper (120); and the cases, particularly specified in the acts, are, 1. That of persons refusing to attend upon the commissioners summons; 2. refusing to be *examined* generally, or to be sworn, or to answer, or to sign and subscribe their examination; and lastly, the not *fully answering* to the satisfaction of the commissioners.

(120) In the case of commitment of a bankrupt for refusing to attend the assignees after obtaining his certificate, the statute directs it to be to the county gaol. And where committed by a judge's warrant upon the commissioners certificate, it is to the gaol of the county where apprehended.



Upon this subject I shall first consider, the nature and extent of the commissioners authority, in respect of this power of commitment, generally; next, the several determinations that have occurred in the particular cases above enumerated; and lastly, the form of the commitment and proceedings incident to it.

1. *Of the nature of the commissioners authority, Generally.*

The only two points, for the determination of which, it has been thought necessary to enter into any discussion concerning the nature of the commissioners authority generally, are, 1. how far they can be considered as *judges*, and therefore not liable to answer personally for erroneous judgments, when exceeding their jurisdiction; and 2. how far they can be considered as a *court of justice*, and therefore able to protect the bankrupt or other persons attending them, or returning from examination. Upon both points, there seems to have been some contradiction, if not in the determinations, at least in the language used by the different judges upon these subjects, and even by the same judges at different times.

In some cases it has been laid down that they are neither *judges*, nor have *judicial* authority<sup>a</sup>; that they have only an *authority*, but no *jurisdiction*<sup>x</sup>; that they are neither judges nor have

<sup>a</sup> Groenvelt and Burwell, Ld.  
Raym. 467.

<sup>x</sup> Ld. Raym. 580.

BOOK III.  
CHAP. VI.  
SECT. V.

any of the *requisites* of a *court of justice*, that they have very little *judicial* discretion, and that their office is chiefly *executory* and *ministerial*<sup>y</sup>; and in a late case<sup>z</sup>, the expression used by the court was that they were not *satisfied* that the commissioners could be considered as a *court of justice*, or could give relief in the case of a person arrested while attending them to prove a debt. On the other hand, it has in other cases been laid down, that the commissioners are a *court of justice*, sufficient for the purpose of having their witnesses protected<sup>a</sup>; and that they are a *court of justice*, whom the bankrupt is as much bound to attend, as any other witness is, any *other court of justice*<sup>b</sup>.

Notwithstanding, however, these apparent differences, and which there seems to be some difficulty to reconcile, at least while it has not in any case been defined what is a *judge* or a *court of justice*, there seems to be no difficulty to state the doctrine that may be collected from the cases altogether; and that if by *judges* or *courts of justice*, is to be understood, persons not liable to answer personally for exceeding their jurisdiction, or persons having a direct or original power in themselves of protecting their witnesses *eundo et redeundo*, the commissioners are clearly neither *judges*, nor a *court of justice*.

<sup>y</sup> Miller and Seare, Bl. 1141.

<sup>z</sup> Kinder and Williams, 4 T. R. 377.

<sup>a</sup> Exp. Stowe, Bla. 1142.

<sup>b</sup> Darby and Baughan, 5 T. R. 209.

With respect to the first; though doubts have been entertained<sup>c</sup> whether commissioners were not even *judges of record*, upon the ground that the statutes of H. 8. and Eliz. considered all bankrupts in the light of *criminals*, and that the same *coercive* power given to the great seal by the former of these statutes was vested in the commissioners by the latter; yet it appears to have been long held<sup>d</sup>, and by repeated and solemn determinations perfectly established<sup>e</sup>, that commissioners of bankrupt are not judges; that they have but a limited and special authority, under particular acts of parliament, which they must strictly pursue; that their proceedings are traversable; that they cannot commit for punishment, but only *until* the party submit himself to their authority, in the special matter, as to be examined, &c.; and that if they go beyond the line of their jurisdiction they are liable to the party in an action.

With respect to the second; notwithstanding the general expression of calling them a court of justice, there is no case in which they have ever been allowed to have any direct power of protecting their witnesses from arrests, or any exercise of the power of commitment for a contempt, in cases of contravention or interruption of their authority by other persons or jurisdictions. But though they

<sup>c</sup> Gould J. in *Miller and Seare*,  
Bla. 1146.

<sup>e</sup> *Miller and Seare*, Bla. 1141.  
*Dyer and Miffing*, ib. 1035.

<sup>d</sup> 8 Co. 121. *Ld. Raym.* 467.



BOOK III.  
CHAP. VI.  
Sect. V.

have no such power in themselves, it seems that the court of Chancery will interpose in the protection of their witnesses; and treat the arrest, of a person attending them or returning from examination before them, as a contempt of that court<sup>f</sup>. And where a sheriff's officer had arrested a witness as he was returning from examination before the commissioners, and abused their summons, *Ld. Hardwicke* ordered that the officer should attend the master to answer interrogatories to be exhibited concerning the contempts, otherwise to be committed to the Fleet<sup>g</sup>.

2. *Of commitments in Particular cases.*

*For Non-attendance upon the  
Commissioners summons.*

If the bankrupt, in the intermediate time between the opening of the commission and the finishing of his examination, is summoned by the commissioners and refuses to attend, they may certify that the commission is issued and the party proved before them to be bankrupt; and upon such certificate, any of the twelve judges or any justice of the peace is required, upon application to him for that purpose, to grant a warrant for apprehending the bankrupt and committing him to prison, till removed by the commissioners warrant in order to be examined.

<sup>f</sup> *Exp. Stowe*, Bl. 1142.

<sup>g</sup> *Exp. Kerney*, 1 *Atk.* 55.

In a case upon this subject<sup>h</sup>, where the commissioners had made their certificate to the judge variant from their summons, the latter being general for the bankrupt to attend, and the former specifying the particular cause for which they summoned him, *Ld. Hardwicke* held this to be immaterial; the commissioners being under no necessity of mentioning in their certificate the *cause* of their summoning the bankrupt, because the judge, upon their barely certifying that the bankrupt *refused to attend*, was obliged to commit him (121).

For the case of *other* persons than the bankrupt refusing to attend, there is no provision in any of the statutes (now in force) (122), except the first of *James*, which relates only to persons suspected of detaining the bankrupt's property; and the 21 of *Ja.*, which gives the same power to compel the attendance of the wife.

The former of these statutes directs, first, a summons to the party; secondly, on his default or neglect, having no lawful impediment, (made known to the commissioners at the time of their meeting and allowed of by them), either a war-

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<sup>h</sup> *Exp. Lingood*, 1 *Atk.* 240.

(121) The *statute* does not require the commissioners to certify that the bankrupt refuses to attend, but only that the commission is issued, and the party found a bankrupt.

(122) There was in the 4 and 5 *Anne*, and the 5 *Geo.* 1.

BOOK III.  
CHAP. VI.  
SECT. V.

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rant to bring him before them in custody, or else a second summons at their discretion; and if upon the second summons he refuses to come, then and not before, they have power to commit. Where, therefore, an action of false imprisonment was brought against commissioners who had committed one suspected of detaining effects of the bankrupt for not attending to be examined on a *first* summons, they were held to be clearly liable<sup>1</sup>.

*For not Fully Answering to the Satisfaction  
of the commissioners.*

To questions, which require, and admit of a full and *particular* answer, as, to account for the disposal and application of large sums of money, *general* answers are not sufficient.

A bankrupt, being asked to account particularly, for the application of a large sum of money which appeared to be deficient upon a general state of his accounts made out by himself and the assignees, wilfully and obstinately refused to give any other than a *general* answer, of great losses upon goods, and that for several years he had been extremely extravagant, and spent large sums of money. This answer appearing unsatisfactory to the commissioners, they committed him, upon which he brought a habeas corpus; but the King's Bench

<sup>1</sup> Dyer and Miffing, Bla. 1035.

remanded



remanded him, holding the question to be proper, and the answer *incomplete* and *unsatisfactory*<sup>k</sup>.

BOOK III.  
CHAP. VI.  
SECT. V.

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Having submitted to a further examination, and the same questions being proposed to him as before, he particularized a woman upon whom he had expended a very large sum of money in the course of one year, and particularized also the amount and the times of sending and giving it. But he said no other person was privy to this; the woman was dead, as he had heard; she and he both knew that he was utterly insolvent at the time; that he kept no memorandums of what he had given her either in that or former years; and that most of the letters between them were burnt or destroyed. He was recommitted, and being brought up again to the Court of King's Bench, was again remanded, the answer being *incomplete* and *unsatisfactory*<sup>l</sup> (123).

In like manner, *general* answers by a bankrupt, by way of accounting for a large deficiency which he *admitted*, but which did not appear in his *books*;

<sup>k</sup> Perrot's ca. Burr. 1122.

<sup>l</sup> S. C. *ibid.* 1215.

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(123) The answers upon this further examination seem not to have been objectionable on the ground of their *generality*, but their *improbability*: and the case, therefore, seems to be an authority against Ld. Mansfield's own doctrine delivered afterwards (but now exploded) in *Pedley's* case. See below, p. 363, 4.

and

BOOK III.  
CHAP. VI.  
Sect. V.

and which general answers were falsified by his subsequent confessions as to particular sums, made whilst the warrant for his commitment was preparing, were held to be insufficient and unsatisfactory<sup>1</sup>.

But although an answer is not *positive*, as, where it depends upon the degree of the party's recollection, and he answers to his *remembrance*, and swears he cannot *positively* answer further, this may be sufficient<sup>m</sup>.

So where a bankrupt, being asked whether he could form any *belief*, whether he bought a certain parcel of goods by a broker or not; said he could not *positively recollect* whether he had bought them by a broker or not, but should *rather* believe he had bought them by a broker. And being further asked, whether by the words "he should rather believe," he meant that he did believe he *had* bought them by a broker, or meant that he did believe he had *not* bought them by a broker, he refused to answer, otherwise than by referring to his former answer, and was committed as not fully answering the commissioners' question. But he was discharged upon a habeas corpus, his answer being held to be as full and satisfactory as the nature of things would permit. And it was said, that it might be true, that he had no *certain* recollection

<sup>1</sup> Langhorne's ca. Bl. 919.

<sup>m</sup> Perrot and Ballard, 2 Cha. ca. 72.

whether

whether the goods were or were not bought by a broker, but might *rather believe* they were. And if he really had no recollection, it was impossible to make any other answer. Such an answer, it was said, was sufficient for civil purposes: and that if a man swears he has no positive recollection, and it can be proved that he has, he may be indicted for perjury. But that till that be shewn, he must have the same credit in swearing to that negative, as in all other cases" (124).

The doctrine, that an answer is sufficient if such as that perjury might be assigned upon it, which was suggested in this case, (for it does not seem to have been laid down absolutely; or to have been necessary to the determination, as the court does not seem to have doubted of the *credibility* or *truth* of the answer), was afterwards carried so far that it was held<sup>o</sup>, that if the party swears fully, and as the phrase is, roundly, the commissioners cannot commit him; and though they have every reason to believe, and every circumstance tend to shew that he has sworn falsely, they must take it to be

<sup>n</sup> Millar's ca. Bl. 881. 3 Will.

• Pedley's ca. Leach, 301.

(124) Gould, J. thought the question put by the commissioners in this case, not a lawful question, but a wanton abuse of their jurisdiction: an ensnaring question, merely calculated to entrap the man. (Bl. 1146.)

*satisfactory,*



BOOK III.  
CHAP. VI.  
Sect. V.

*satisfactory*, provided it would be so in case it were true (125).

A doctrine of this kind was not likely to remain long uncontradicted, and has accordingly been completely overturned, in a very late case<sup>p</sup>; in which it was determined, that if an answer, whether considered by itself, or considered with reference to the rest of the party's examination either at the same time or at different times, is such as a reasonable mind cannot believe or be satisfied with, the commissioners will be right in deeming it unsatisfactory.

But mere *prevarication* is not a sufficient ground for commitment: for a man may prevaricate or answer backwards and forwards, and yet come to a settled answer at last<sup>q</sup>.

<sup>p</sup> Exp. Nowlan, 6 T. R. 118.

<sup>q</sup> Nathan's ca. Str. 880. Barnard. B. R. 398.

(125) One of the most extraordinary determinations to be met with in the bankrupt law! That an answer palpably *absurd* and *false*, and acknowledged to be so by the party himself in a subsequent examination, should be deemed answering to the *satisfaction* of the commissioners, was such a construction of the word *satisfactory*, as would have made all examinations under a commission a mockery; and a nuisance, instead of a benefit, to creditors. Had this case ever been, or remained to be law, it would very shortly have set at rest any question as to whether commissioners were a court of justice, in any sense, or to any purpose whatever.

For

*For Misbehaviour.*BOOK III.  
CHAP. VI.  
Sect. V.

The expression in the statutes, of committing the party till he shall *submit* himself to the commissioners, does not mean an act of humble submission, but only that he shall submit in the particular instance, as, to be examined, to make answer to the question proposed, &c<sup>r</sup>. And a commitment, therefore, of one for *misbehaving* himself to the commissioners is bad<sup>s</sup>.

3. *Of the Form of the Commitment, and proceedings incident to it.*

As the commissioners have but a special and limited authority, they must in their commitments, strictly pursue the Act; and the warrant ought to set forth the particular ground of the commitment, that the court may judge whether they have kept within or exceeded the line of their jurisdiction. For they are liable to answer for an illegal exercise of their power, if they issue their process either for an *improper cause*, or at an *improper time*, or for *improper questions*, or for not being satisfied with a *proper answer*<sup>t</sup>. And for this reason, it is expressly directed by one of the statutes, that where any person is committed for refusing to answer, or not fully answering any questions put to him by

<sup>r</sup> Bracy's ca. Ld. Raym. 99.<sup>t</sup> Bla. 1147.<sup>s</sup> Miller's ca. Bla. 881. 1144.

1147.

word

BOOK III.  
CHAP. VI.  
SECT. V.

word of mouth or interrogatories, the commissioners shall *specify* such *questions*, in their *warrant* of commitment.

A commitment, *until* the party shall *conform himself* to the *authority of the commissioners*, generally, is bad; for they have several authorities, and under such a commitment, the party might remain in prison till he submitted to their authority, in a matter in which they might have no power to require a submission<sup>u</sup>.

Or a commitment, *till* he shall be *discharged* by *due course of law*<sup>x</sup>.

Or, *till* he shall full answer make to *all such questions* as shall be put to him<sup>y</sup>.

It has been held; in cases where one of the reasons of commitment appearing upon the warrant was bad, although there was another set forth in it, upon which the commitment would have been good; that as the party was committed until he should submit also in the matter in which the commissioners had no authority, the commitment was illegal, and the party ought to be discharged<sup>a</sup>.

This, however, has been since doubted; and it has been said<sup>b</sup> that perhaps the illegal ground might be rejected as superfluous, and the com-

<sup>u</sup> Bracy's ca. Ld. Raym. 99.

<sup>x</sup> S. C. ib. Hollinghead's ca. Ld. Raym. 851. Nathan's ca. Stra. 580.

<sup>y</sup> Miller's ca. Bla. 881. 1141.

<sup>a</sup> Exp. James, 1 P. W. 610. Nathan's ca. Barnard. B. R. 398.

<sup>b</sup> Miller and Seare, Bla. 1144.

mitment



mitment be referred to that cause which, if true, was a legal one. And it is particularly provided for by the 5 Geo. 2. that if upon the return of the habeas corpus to be discharged from a commitment, there shall appear any such insufficiency whatever in the *form* of the warrant, by reason whereof the party might be discharged, the court shall and is required to remand the party till he shall conform, *unless it be made appear* to the court by the party committed that he has *fully answered* all lawful questions put to him; or where the commitment is for *not signing* his examination, that he had a good and sufficient reason for refusing to sign the same.

When a party is committed, he must send word to the commissioners when he is willing to conform<sup>c</sup>.

But the meeting must be at the expence of the estate, though it arises from the bankrupt's own misconduct; for the bankrupt has no estate, or is supposed to have none<sup>d</sup>.

<sup>c</sup> Bull. J. in R. and Jackson, 1 T. R. 654.

<sup>d</sup> Exp. Graham, 2 Bro. 48.

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*Of the proceedings at Law, in cases of such Contumacy or Nonconformity.*

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13 *Eliz. c. 7. f. 6. 9.*1 *Ja. c. 15. f. 9. 11.*21 *Ja. c. 19. f. 7.*5 *Geo. 2. c. 30. f. 1. 21.*

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Besides the powers given particularly to the Commissioners, for compelling a discovery from the bankrupt or others ; there is also a variety of clauses in the older statutes, imposing pecuniary and even corporal penalties, to be recovered or inflicted at Law, in cases of wilful concealment, refusing to swear, failing to disclose the whole truth, false swearing, &c. &c. : but few of which seem likely to be put in force now, except perhaps such as relate to the prosecution of witnesses for perjury, which have been adopted by the statutes of modern times.

Some of them inflicting corporal penalties upon the bankrupt, for concealments, or absconding from the commission, are impliedly repealed by the regulations of the later statutes ; which, while they are more liberal and indulgent to the bankrupt, both in allowing him a longer time, and in holding out to him other advantages by way of inducement

inducement to an early and entire conformity, do not make these concessions gratuitously, but annex to them the alternative, that if he makes any default or wilful omission in not surrendering in the manner and at the time prescribed, or if he conceal any part of his estate *to the value of twenty pounds*, or any books, papers, or writings relating thereto, *with intent* to defraud his creditors, he shall, upon conviction by indictment or information, be adjudged guilty of felony, and suffer as a felon without benefit of clergy.

It seems to be perfectly clear from the express words of the statute, (and upon the plain general principles of criminal law), that to constitute the *crime* of non-surrender, or concealment, it must be *wilful*, and *with intent* to defraud creditors<sup>d</sup>.

Where the omission appears to have proceeded from an ignorance of the consequences or from accident, the court of chancery will not lend its aid to a prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission; but will leave the prosecutor to go on, as he can, at law: and has, in such cases, more than once, superseded the commission, to prevent prosecution<sup>e</sup>.

Such a prosecution may be carried on by a person who is not a creditor; yet *Ld. Hardwicke*

<sup>d</sup> *Exp. Rodgers*, Ambl. 307.  
*Exp. Grey*, 1 Vez. J. 195.

<sup>e</sup> *Exp. Wood*, 1 Atk. 221.



BOOK III.  
CHAP. VI.  
SECT. VI.

thought that by the words of the act, it looked as if the legislature intended there should be a *concurrence* of the creditors under the commission. And he refused a petition by a person, to be admitted a creditor, and that the clerk should be ordered to attend with the proceedings, in a case of this kind, in which the circumstances were favourable for the bankrupt, and where the *assignees and principal creditors* said, they were satisfied with the account the bankrupt had given of his affairs, and believed he could not have made a fuller discovery if he had surrendered at the appointed time<sup>f</sup>.

Though the Ld. Chancellor, in cases of innocent default by a bankrupt, will make an order for taking his surrender at another day, this does not save the felony, or avoid the effect of the statute; but has merely the effect of declaring the *opinion* of the court, that the bankrupt's omission to surrender, was not with a fraudulent intent<sup>g</sup>.

In an action by the assignees, to recover double the sum sworn to, after a conviction of perjury in swearing to a fictitious debt, it is sufficient to state the conviction on the indictment, without alledging that the defendant did take such false oath. And he cannot take advantage of any defect in the judgment upon the indictment; which can only be done on a writ of error<sup>h</sup>.

<sup>f</sup> S. C. *ibid*.

<sup>g</sup> Exp. White, 1 Bro. 47.

<sup>h</sup> Holmes and Walsh, 7 T. R. 458. See 1 Ja. c. 15. s. 11, 12. and 5 Geo. 2. c. 30. s. 29.

## CHAP. VII.

*Of the Certificate.*


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7 Geo. 1. c. 31. f. 2.

5 Geo. 2. c. 30. f. 7. 9—13.

24 Geo. 2. c. 57. f. 9, 10.

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THE alteration which took place by the introduction of the *certificate*, seems to be by far the greatest and the most important in its consequences, of all the changes that the bankrupt law has undergone, since its first institution: not merely for the variety of questions, and the multitude of determinations, to which it has given rise; but principally on account of the remarkable change of the temper and character which has been impressed by it, upon the whole system, in modern times. Instead of being, as formerly, only a peculiar species of criminal law, operating in the very first instance against the *person* of the individual, upon the presumption of *crime*, in an unhappy debtor's avoiding creditors whom he was unable to pay; and in the last instance, after stripping him of the whole of his property, still leaving him to the mercy of his unsatisfied creditors<sup>h</sup>, and offering to him no one prospect either of any recompence of

BOOK III.  
CH. VII.

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<sup>h</sup> 13 Eliz. c. 7. f. 10.

his integrity or alleviation of his distress, except only the hopeless *chance* of a *surplus*, from a *wrecked* fortune: it has, by the introduction of the certificate, and the different regulations dependent upon or connected with it, been converted into an equitable and liberal system, founded upon principles of humanity as well as justice, calculated not only for the security and satisfaction of creditors, but the protection, discharge, and relief of the unfortunate and honest debtor.

By the 5 Geo. 2. a bankrupt surrendering to his commission, making a full discovery of his effects, and in all things conforming to the directions of the Act, may, with the consent of his creditors, obtain a certificate from the commissioners of such his conformity; which when allowed and confirmed by the Ld. Chancellor, discharges his person and whatever property he may afterwards acquire, from all debts owing by him at the time he became bankrupt. In order, however, to prevent either the granting or withholding of such certificate, from being perverted from its original purpose, or being made the instrument either of fraud upon the creditors, or of oppression upon the bankrupt, the Act has been particularly careful in requiring a number of forms to be observed, and conditions to be complied with, before it can either be obtained at all in the first instance, or be of any avail afterwards, when the bankrupt may have occasion to make use of it.

The



The guards, which for these purposes have been put upon it by the legislature, respect, 1. The persons, whose concurrence and authority is required to the signing of it originally: 2. The superintendence and control of the great seal, in the subsequent allowance and confirmation of it; and lastly, the particular cases of exception, by which, even after it has been allowed, it may be avoided, and its operation defeated. These three heads, together with the consideration of the *Effect* of the certificate when allowed, as to the kind of debts that it discharges, and the *Manner* of the bankrupt's *availing* himself of it in courts of justice, will comprehend every thing that in any way relates to the law upon the subject of this chapter.

## SECT. I.

*Of the Signing of the Certificate.*1. *By the Creditors.*

No bankrupt is entitled to the benefits of the Act, unless *four* parts in *five* in *number* and *value* of his creditors, who shall be creditors for not less than *twenty pounds* respectively, and who shall have *duly proved* their debts under the commission, or some other persons by them duly authorized, shall sign the certificate, and testify their consent to his having the benefit of it, and being discharged in pursuance of the Act.

A certificate, therefore, signed by a creditor who ought not to have been admitted to prove, his debt being contingent, would clearly be irregular<sup>1</sup>.

Persons proving debts in *autre droit*, as executors, guardians, &c. may sign it<sup>k</sup>; but if they have proved several debts in distinct rights, as where a person has one debt in his own right, and another as executor, &c. *Ld. Hardwicke* thought he could not sign in both rights; for that both were to be considered as his own particular debt<sup>l</sup>.

The bankrupt himself becoming executor of a creditor, may, in that capacity, be entitled to sign his own certificate<sup>m</sup> (126).

The creditors who are entitled to sign, are all left perfectly at liberty to do it or not as they chuse: there is no way of compelling them<sup>n</sup>.

## 2. By the Commissioners.

As the signing is optional in the creditors, so it is discretionary on the part of the commissioners.

<sup>1</sup> *Exp. Buckner*, Co. B. L. 497.

<sup>m</sup> *Cooper's ca.* Green 260.

<sup>k</sup> *Exp. Saufmerez*, 1 Atk. 85.

<sup>n</sup> *Doug.* 217.

<sup>l</sup> *S. C.* *ibid.*

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(126) In this singular case, the father of the bankrupt was the principal creditor, and sole assignee under his son's commission; but dying intestate, leaving the bankrupt his only child, who thereby became his sole personal representative, and in that capacity, the principal creditor under his own commission; he as such, chose himself sole assignee, and signed his own certificate, which was afterwards allowed.

To

To determine whether the bankrupt, upon examination before them, has made a full discovery, and in all things conformed to the directions of the Act, and whether they have any reason to doubt of the truth of such discovery; is altogether a matter of judgement, and left to their discretion. In the exercise, however, of that discretion, they ought to be governed entirely by the fairness or fraudulent conduct of the bankrupt<sup>o</sup> (127).

The statute expressly prohibits them from signing *till* it has been signed by the requisite number and value of the creditors (128).

<sup>o</sup> Exp. Williamson, 1 Ark. 82.

(127) *Qu.* Whether, under particular circumstances, the *Ld. Chancellor* might not call upon the commissioners to assign the *grounds* upon which they refused their certificate; and if it appeared that they were mistaken in point of *law* (as if they should withhold it on the ground of the bankrupt's *keeping a lottery office*, or giving above 100 l. with a *niece*, &c.), whether he might not make an *order* upon them to sign it?

(128) The course formerly observed, seems to have been first for the commissioners to certify; next for the creditors to sign their consent; and then for the commissioners, upon affidavits of such signature, to certify this also at the foot of the latter. See 7 Vin. 132.



*Of the Allowance and Confirmation of the Certificate.*

After it has been signed by the commissioners, the certificate, together with an affidavit by the bankrupt, that it was obtained *fairly and without fraud*, must also be laid before the *Lord Chancellor*, in order to be by him allowed and confirmed.

This power also, like that of the commissioners as to the signing of it originally, though discretionary in the Lord Chancellor, is to be exercised, not in an arbitrary, but in a discreet and equitable manner, according to the behaviour of the bankrupt <sup>p</sup>.

Before the allowance, *any* of the creditors may be heard before the *Ld. Chancellor*, (or such two of the judges to whom he may refer the consideration of it), against the making of the certificate, and against its being confirmed: And this right of being heard in opposition, is given by the statute, to all the creditors without any distinction. A creditor, therefore, under twenty pounds, although he cannot sign it, may oppose it; for all the creditors are equally affected by the consequences of it <sup>q</sup>: and those who have already signed, may afterwards object to its being allowed <sup>r</sup>. But the Chancellor himself

<sup>p</sup> Exp. Williamson, 1 Atk. 82.<sup>r</sup> Tudway and Bourne, Burr.<sup>q</sup> Exp. Allen, 7 Vin. 134.

718.

may suspend or finally disallow it, even where the creditors make no opposition\*.

BOOK III.  
CH. VII.  
Sect. II.

The causes for which the Chancellor may, or ought to *disallow* a certificate, as they are nearly the same which would defeat it in a court of law, after it had been allowed, will be considered all together in the following section, which is appropriated particularly to that subject: and here I shall only add what relates to the subject of *staying* the certificate, or suspending it for a time.

Whether as necessarily incident to the greater power vested in him, of allowing or disallowing it altogether, or to his general superintending authority, with respect to all the proceedings under a commission of bankrupt, the Chancellor may, and frequently does *postpone* the allowance of it, for a variety of purposes: chiefly that of preventing any surprise upon the creditors, where, either by reason of too great a precipitancy on the part of the commissioners and the rest of the creditors in signing it, or from other causes, they have not had sufficient opportunity of enquiry into the conduct of the bankrupt, or sufficient time for coming in under the commission to prove their debts, so as to have a voice in the granting or withholding of his certificate.

Where a certificate was signed on the very day the bankrupt *finished his examination*, and the prin-

\* S. C. *ibid.*

BOOK III.  
CH. VII.  
SECT. II.

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principal creditors lived abroad, and from that and other circumstances had not had an opportunity either to enquire into the bankrupt's conduct, or to ascertain and prove their debts, the certificate was staid, in order to give them time for those purposes<sup>t</sup>.

A like order was made with respect to a certificate signed in less than *three months* after the issuing of the commission, in a case under similar circumstances, and where the bankrupt himself had been a trader in Ireland, and the greatest part of his books were then in that country<sup>u</sup>.

And even in a case where it had been signed by the commissioners within a few days of three months after the commission issued, Ld. Hardwicke disapproved extremely of *such* precipitancy; and for that reason *only* (as far as appears by the report), staid the allowance, in order to afford a creditor time for coming in to prove his debt, that he might have an opportunity of assenting or dissenting to the certificate<sup>x</sup>.

But where the four-fifths of the creditors who have already proved under the commission, have signed, and there appears to have been no precipitancy on the part of the commissioners, new creditors coming in afterwards cannot stay it upon the ground that there are not now, by their coming

<sup>t</sup> Exp. Saufmerez, 1 Atk. 84.

<sup>x</sup> Anon. 1 Atk. 84.

<sup>u</sup> Exp. Williamson, 1 Atk. 82.

<sup>2</sup> Vcz. 249.



in, four-fifths in number and value who have signed; but if they would set it aside, they must prove it to have been *fraudulently* obtained<sup>y</sup>.

The certificate will not be staid upon the application of one that has not either proved a debt, or does not shew a reasonable ground for a claim. It has been refused, therefore, where the demand was not liquidated, but depended upon a long account to be taken; and where the party claiming would not venture to swear the balance would be in his favour, but the bankrupt swore positively that the balance would be coming to himself<sup>z</sup> (129). And any one applying to stay it, in order to have an opportunity of proving, ought to account for his not having applied sooner<sup>a</sup>.

The certificate is frequently staid, to give creditors who are proceeding at law, an opportunity of coming in under the commission for the purpose of assenting or dissenting to it (130).

<sup>y</sup> Exp. Fydell, 1 Atk. 73.

<sup>a</sup> Exp. Adams, 2 Bro. 48.

<sup>z</sup> Exp. Johnson, 1 Atk. 81.

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(129) In this case, the application was also made after four-fifths of the creditors had signed.

(130) See above, p. 153.

*Of the circumstances which Avoid the certificate,  
or defeat its operation.*

The causes of exception to the validity of a certificate, or which may defeat its operation, depend partly upon positive statute; partly upon principles established in particular cases.

The exceptions given by the statute, relate either to fraud in *obtaining* it, or to certain frauds or other misbehaviour of the bankrupt, in respect either of his conduct under the commission, or his conduct as a trader, before it.

The statute (as has been already observed) requires that the bankrupt, when the commissioners' certificate is laid before the Ld. Chancellor, should make an affidavit that it was *obtained* fairly and without *fraud*; and in the clause which enables him to avail himself of the certificate, in any action brought against him, says, that a verdict shall pass for the defendant *unless* the plaintiff can prove that the certificate was *obtained* unfairly and by fraud. From these clauses it might be inferred, that the legislature intended it should not avail, if *obtained* by any kind of fraud, besides those particularly mentioned in other parts of the Act. But the only circumstances that can be considered as properly referable to the case of *obtaining*

*taining* it by fraud, and that are particularly specified in the Act, are 1. That of the bankrupt or other person giving, between the time of his becoming bankrupt and such bankrupt's discharge, any security to, or to the use of any creditor, or for securing the payment of any debt or sum of money due from the bankrupt at the time of his bankruptcy, as a consideration, or to the intent to persuade him, to consent to, or sign any such allowance or certificate. 2. That of persons, with the privity of the bankrupt, fraudulently swearing to fictitious or pretended debts under the commission, and signing the certificate in respect of such fictitious and pretended debts; and the bankrupt not disclosing such fraud, by writing, signed and delivered by him to one or more of the commissioners or assignees, before the commissioners shall have signed the certificate.

In the construction of this statute, it is held to be perfectly clear (notwithstanding a former determination to the contrary<sup>b</sup>, and which seems now to be totally exploded), that it is not to be confined to the case of *signing* only, but that the case of a security given in consideration of the party's *withdrawing* a *petition* preferred by him against it, to the intent that the allowance and confirmation thereof by the Lord Chancellor might be obtained, is not only within the true spirit and policy of the act, but also di-

<sup>b</sup> Lewis and Chafe, 1 P. W. 620.



BOOK III.  
CH. VII.  
Sect. III.

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rectly within the words of it, which say that securities given as a consideration to persuade a creditor "to *consent* to, or sign the certificate shall be void <sup>c</sup>."

Any fraud in obtaining the *allowance* of the Ld. Chancellor, is equally within the Act, as a fraudulent obtaining of the *signature* of the creditors: and if some creditors are induced by money to sign, though the bankrupt does not know of it at the time of signing, nor when he makes the necessary affidavit to obtain the Ld. Chancellor's allowance, yet if he knows it *before* it is *actually allowed*, and does not disclose it, the certificate is void <sup>d</sup>.

And even if money is secured or given by a friend of the bankrupt, without his privity, and though he does not know of it at any time; or by an enemy, for the mere purpose of depriving him of the benefit of his certificate; yet the certificate will be void; upon the distinction, that although a third person shall not be *punished* for the fraud of another, yet he shall not *avail* himself of it. A certificate obtained under such circumstances, though without the privity of the bankrupt, is a fraud upon the creditors at large, who are all equally affected by the consequences of it, and cannot be deprived of their remedy against the bankrupt, but by a certificate which is obtained agreeably to the directions of the statute <sup>e</sup>.

<sup>c</sup> Sumner and Brady, 1 H. Bl. 647.

<sup>d</sup> Robson and Calze, Dougl. 216.

<sup>e</sup> S. C. ibid. Holland and Palmer, Bos. and Pull. 95.

In one of the cases, however, in which this doctrine was held, it was also laid down<sup>f</sup>, that money given by any one, *in fraud* of the *bankrupt* himself, with a view to hinder his certificate, would not hurt, if there were creditors sufficient in number and value, without those who were induced to sign, by money (131).

Though the money, or the security, is given for the benefit of *all* the creditors, that will not save it. The statute was intended not only to prevent any inequality, or fraud on the part of the bankrupt, with respect to particular creditors, but also to protect against such oppression or extortion as might be practised upon the bankrupt himself, by a combination of all his creditors, to exact conditions for signing his certificate<sup>g</sup>.

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<sup>f</sup> Robson and Calze.
<sup>g</sup> Jones and Berkley, Dougl. 669. n.

(131) If the free and unbiassed approbation of the creditors is to be considered as the principle which ought to be had in view in the construction of this Act, that is equally affected, in the case of money given by an enemy, as in that where it is given by a friend. Or if the principle of the injury to the bankrupt was to be attended to, why should it not operate in the latter of these cases as well as in the former? Is not the *friendly* fraud equally injurious, with the *inimical* one, to the *innocent* bankrupt? In the principal case to which these observations relate, there was not one ground of the determination on which the judges were unanimous. In Holland and Palmer (see above), this distinction of the case of a malicious payment, was doubted; and it was said, the bankrupt would, in such a case, be at liberty to procure another certificate. By Eyre, Ch. J.

BOOK III.  
CH. VII.  
Sect. III.

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All *securities* given for money to induce creditors to consent to or sign it, are made void by the statute, and neither the payment can be enforced in an action, nor the money paid be retained, but may be recovered back in an action for money had and received, as being paid upon an illegal consideration; in which the defendant cannot avail himself of the maxim that in *pari delicto potior est conditio defendentis*, which applies to cases of acts immoral in themselves, or contrary to general laws of public policy and expedience, but not to the case of special prohibitions such as this, made to protect weak and necessitous men from being imposed upon or oppressed<sup>a</sup>.

The certificate may be avoided also upon other grounds of exception, particularly specified in the statute; and which relate either to the bankrupt's conduct under the commission, or his conduct as a trader before it.

It will not be a bar in an action brought against him by a creditor, if the creditor can make appear any concealment, by such bankrupt, to the value of ten pounds. But on the other hand, the bankrupt may shew that the concealment was not wilful, or fraudulent<sup>b</sup>.

He shall have no benefit by it, if upon the marriage of any of his *children*, he shall have given above the value of a hundred pounds; unless he shall prove by his books or otherwise, upon oath before the commissioners, that he had at the time,

<sup>a</sup> Smith and Bromley, Dougl.  
671. n. Cowp. 200. 792.

<sup>b</sup> Cathcart and Blackwood,  
Ho. of Lds. 1765.



over and above the value so given, sufficient to pay all his creditors their full debts: or if he shall have lost at any game, or by having a share in the stakes, or betting on either side, the value of Five pounds in any one day, or the value of a Hundred pounds in the whole, within the space of twelve months next preceding his becoming bankrupt: or if within one year before he became bankrupt he shall have lost the sum of a Hundred pounds by any contracts with respect to any stock of any company or corporation, or shares of government or public funds or securities, where the contract was not to be performed within a week after making it, or where the stock was not actually transferred or delivered in pursuance of the contract.

BOOK III.  
CH. VII.  
Sect. III.

These clauses being penal, it has been held, they ought to be construed strictly.

With respect therefore to the first exception, that of giving above a hundred pounds upon the marriage of any of his *children*, it has been held, that giving above that sum upon the marriage of a *niece* was not within the act<sup>i</sup>.

So with respect to the second, the clause relative to gaming, it has been construed not to extend to the case of insuring in the lottery<sup>k</sup>: and still less therefore to that of keeping a lottery office<sup>l</sup> (132).

But

<sup>i</sup> Exp. Sausmerez, 1 A. k. 86.

<sup>l</sup> Exp. Richardson, Co. B. L.

<sup>k</sup> Lewis and Piercy, 1 H. 499.  
Bla. 29.

(132) This is clearly neither gaming, nor any fraud or misconduct whatever. In the same case, it is said to have been held,

BOOK III.  
CH. VII.  
SECT. III.

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Lastly, the operation of the certificate may be defeated in particular cases, upon grounds independent altogether of the circumstances mentioned in the statutes.

If the bankrupt has obtained no certificate under a first commission, a certificate under the second will be of no avail: for such second commission against an uncertificated bankrupt, and all the proceedings under it, are void <sup>m</sup>.

Although a bankrupt is discharged by a certificate regularly obtained, he may preclude himself from the benefit of it, by making himself liable on a *new promise*. He may certainly contract new debts; and though the old debts are discharged by the certificate, yet they subsist in conscience, and may be revived by a subsequent promise, on a fair consideration, where there is no fraud or imposition

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<sup>m</sup> Exp. Proudfoot, 1 Atk. 252  
Martin and O'Hara, Cowp. 824.

Exp. Brown, 4 Bro. 210. 2 Vez.  
J. 67.

held, that *obtaining goods under false pretences* is no ground for opposing the certificate. If such persons are entitled to a certificate, which restores them to credit with the world, as persons whose failure has been owing to losses and unavoidable misfortunes in trade, and not as persons who get goods and effects into their custody, and sell or pawn them for less than the value, to raise ready money (see the preamble to the 5 Geo. 2.); while a father, able to pay all his creditors within one farthing of twenty shillings in the pound, is to be excluded from the benefit of it altogether, because he may have paid above a hundred pounds on the *marriage* of his *son* or *daughter*, years before his bankruptcy; the law seems at least to require some amendment.

upon

upon the bankrupt<sup>2</sup>. If the bankrupt could not make himself liable upon a new promise, the clause in the statute, which avoids securities given by him for the payment of any debt *due before* his bankruptcy, as a consideration for signing his certificate, would be totally nugatory<sup>3</sup>.

BOOK III.  
CH. VII.  
SECT. III.

The loan of a new sum of money by an old creditor, to enable the bankrupt to carry on his trade; or the becoming surety for him; would be a good consideration for the bankrupt's giving a security for the old debt<sup>4</sup>.

Or agreeing not to accept any dividend or benefit under the commission<sup>5</sup>.

Paying interest upon a bond after the bankrupt had obtained his certificate, would be an admission that the principal was still due, and he might be liable as on a new contract<sup>6</sup>.

In a common action of assumpsit against the bankrupt, for goods sold and delivered, to which he pleads bankruptcy; the plaintiff may give the subsequent promise in evidence. He is not obliged to declare specially<sup>7</sup>.

But if after a subsequent promise by the bankrupt, to pay a certain sum, in consideration that the creditor would not come in under the commis-

<sup>2</sup> Trueman and Fenton, Cowp. 544.

<sup>3</sup> S. C. *ibid*.

<sup>4</sup> Exp. Burton, 1 Atk. 256.

<sup>5</sup> Trueman and Fenton, Cowp. 544.

<sup>6</sup> Alsop and Brown, Dougl. 182.

<sup>7</sup> Williams and Dyde, Peake's N. P. 68.



BOOK III.  
CH. VII.  
Sect. III.

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sion, the creditor petitions the Chancellor against the certificate, this will defeat the action; for the object of the agreement being to co-operate in the bankrupt's discharge, the petitioning against his certificate is inconsistent with it<sup>1</sup>.

Where a bankrupt is sued for an old debt, revived by a subsequent promise, the court will discharge him upon common bail: for to keep him in prison, upon a conscientious obligation, would be taking advantage of his conscientiousness, to use it against conscience<sup>2</sup>.

It seems to be doubtful whether a promise by a bankrupt to pay *when he is able*, is not conditional; and whether, in that case, the plaintiff ought not to prove him in circumstances to pay<sup>3</sup>.

#### SECT. IV.

#### *Of the Effect of the Certificate.*

##### 1. *As to the kind of demands that are discharged by it.*

The certificate, when allowed, discharges the bankrupt from all debts due or owing by him at the *time* he became bankrupt. This clause of the statute, with respect to the debts that shall be barred

<sup>1</sup> Colls and Lovell, Esp. N.P.  
282.

<sup>2</sup> Besford and Saunders, 2 H.  
Bla. 116.

<sup>3</sup> Bailey and Dillon, Burr.  
736.

by the certificate, has always been considered as a governing rule of construction, in questions concerning what debts may or may not be proved under a commission; and from that, together with the consideration of the general objects and policy of the bankrupt law, it has been inferred, and been laid down as a clear established principle, that the discharge of the bankrupt should be commensurate and co-extensive with the relief of the creditor; or in other words, that all debts shall be discharged by the certificate, that either have been, or that might have been, proved under the commission.

Having endeavoured, in a former part of this work (133), to collect together every thing relating to the subject of what debts may or may not be proved under a commission, it will be enough to refer the reader to that place, in order to ascertain generally what are the debts that are or are not discharged by the certificate.

But as the certificate has a peculiar operation in some instances, with respect to other persons, as well as the bankrupt, as for instance in the case of bail; and as the rule alluded to, of the proof of debts and discharge under the certificate being co-extensive, is not absolutely universal, and is subject in certain cases to particular qualifications, independent of the

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7 1 Atk. 79. 119.

(133) Chap. III. Sect. I. and II. of this Book.

C C 3

mere

BOOK III.  
CH. VII.  
SECT. IV.

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mere circumstance of the demand's being provable or not, in one shape or other, under the commission; it is necessary to take notice also of some matters of this kind which could not so properly be introduced before.

As between the bankrupt and his sureties, if they pay the debt for him before his bankruptcy, they may come in under the commission; and in that case, whether they prove it or not, his debt to them will be discharged by his certificate<sup>a</sup>. But as between the sureties and the creditor, the bankrupt's certificate, though it may discharge him as against the latter, will not discharge his sureties, who will remain liable notwithstanding, to the principal creditor<sup>b</sup>. But with respect to bail, who are entitled to surrender the principal, in discharge of themselves; the rule that has been laid down, is, that if the certificate is allowed, *before* they are *fixed*, they are discharged along with the principal; but if they are *fixed* before the allowance, a new debt arises, which is their own proper debt, independent of the original debt, and which is therefore not discharged by the discharge of the latter<sup>c</sup>. The certificate has no operation till it is allowed, and has no relation back.

Where the bail have no alternative to surrender the principal, as in *Error*, they are not entitled to

<sup>a</sup> See Ch. III. Sect. II. title  
*Sureties*.

<sup>b</sup> 1 Atk. 84.

<sup>c</sup> Woolley and Cobbe, Burr.  
244. Cockerill and Oulton, ib.  
436. Walker and Giblett, Bla.  
811.

relief,



relief, though the bankrupt obtains his certificate pending the writ of error <sup>d</sup>.

BOOK III.  
CH. VII.  
Sect. IV.

Nor where the bankrupt himself would not be entitled to be discharged if surrendered; as in the case of a second commission against a bankrupt not having obtained his certificate under the first <sup>e</sup>.

The course of proceeding formerly, in the discharge of bail, was for the bail to make a formal surrender of the bankrupt; but a practice has been introduced, of the court ordering an *exoneretur* to be entered on the bail piece, without the trouble and expence of a regular surrender; in order to avoid circuitry, in cases where the bankrupt is clearly entitled to his discharge <sup>f</sup>.

The crown not being within the statutes of bankrupt, the certificate will not discharge a debt to the crown <sup>g</sup>.

It has been held in some cases, that the costs incurred by proceedings commenced after the commission, for a debt due before, were discharged by the certificate, as having relation to the original debt <sup>h</sup>.

In cases where the party has an election to shape his demand in different ways, as either in contract, or in tort; if he brings an action, founding upon contract, and the demand is of such a kind as was

<sup>d</sup> Southcote and Brothwaite,  
1 T. R. 624.

<sup>e</sup> Martin and O'Hara, Cowp.  
823.

<sup>f</sup> Ray and Hussey, Barnes 104.  
Martin and O'Hara, Cowp. 824.

<sup>g</sup> Anon. 1 Atk. 262. The  
King and Pixley, Bunb. 202.

<sup>h</sup> See above, p. 106.

BOOK III.  
CH. VII.  
Sect. IV.

capable of being ascertained before the bankruptcy, it will be barred by the certificate; but if waiving that, he sues in tort for uncertain damages, the certificate will be no bar<sup>1</sup>.

So where a creditor is entitled to different remedies, according to the different forms of his securities, as in the case of annuities secured both by a covenant, and by a bond with a penalty; he may either come in under the commission upon the bond, if the penalty is forfeited before the bankruptcy; or waiving that, he may sue the bankrupt at law upon his covenant, on which the bankrupt will still remain liable, notwithstanding his certificate<sup>k</sup>.

For the bankruptcy does not discharge him from an express personal covenant, although by the bankruptcy and assignment under the commission, he is divested of all his property. His certificate is a bar to an action of *debt* for *rent* accrued before his bankruptcy; nor will he be liable in an action of debt for rent accrued subsequent to the bankruptcy and assignment under the commission: for that action is founded on the privity of *estate*<sup>1</sup>, and if the tenancy is determined with the assent of the lessor, the action can no longer be maintained. The assignment under the commission, is considered as made by the virtual assent of the lessor; inasmuch

<sup>1</sup> See above, Ch. III. Sect. II.  
title *Damages*.

<sup>1</sup> Cantrell and Graham,  
Barnes 61.

<sup>k</sup> See above, p. 94.

as the bankrupt's estate and interest is vested in his assignees by an act of parliament, to which every man's assent is implied <sup>m</sup>.

BOOK III.  
CH. VII.  
Sect. IV.

But in an action upon an *express covenant* for rent, he remains liable notwithstanding the bankruptcy and assignment: this action being founded upon the privity of *contract*, which is personal, and collateral to the land <sup>n</sup>.

2. *As it respects the person, or the effects only; or both.*

The certificate generally, operates as a discharge, both of the *person* of the bankrupt, and of his future *effects* <sup>o</sup>.

But if any commission shall issue against any person who has been before discharged by virtue of the act, or compounded with his creditors, or delivered to them his estate or effects, and been released by them, or been discharged by any act for relief of insolvents (134); then in either of these cases, the *person* only of the debtor shall be

<sup>m</sup> Wadham and Marlow, 1 H. Bla. 437. note. 2439. Mills and Auriol, 1 H. Bla. 433. S. C. in error, 4 T. R.

<sup>n</sup> Mayor and Steward, Burr. 94. <sup>o</sup> 1 Atk. 79.

(134) The commissioners generally interrogate the bankrupt to all these points, upon finishing his last examination. See Ld. Apsley's order, 12 Feb. 1774.

The certificate, it should seem, ought in such cases to be special. See *exp. Green*, 1 Atk. 257.

free



BOOK III.  
CH. VII.  
Sect. IV.

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free from arrest, but his future *estate and effects* shall remain liable to his creditors as before the making of the act (excepting only the tools of trade, necessary household goods and furniture, and the necessary wearing apparel of such person and his wife and children): *unless* the estate of such person against whom such commission shall be awarded, shall pay every creditor under the said commission, fifteen shillings in the pound.

Upon this clause of the statute, it has been determined, that a certificate under a second commission, does not protect the future effects, unless the bankrupt has paid fifteen shillings in the pound under it, even though the former has been *superfeded*°. For having been *discharged* under the former, a superfedeeas could not make that not to have been done, which in fact had been done: and supposing the former bankruptcy were to be considered as having never existed, yet the dividend paid and received under the commission, was a *compounding* with creditors, within the meaning of the act (135).

And

° Thornton and Dallas, Dougl. 46.

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(135) The latter reason may, perhaps, be thought the best ground of this determination; and it may be observed, that the superfedeeas in this case was obtained many years after the first commission; only upon the spur of the new one; with the consent of old creditors who had no interest to oppose it; and apparently for the very purpose of defeating such an objection, as  
might

And creditors who have signed the certificate under a second commission, may still recover in a *scire facias* against the future effects<sup>p</sup>: for the words of the act are, "the future estate shall remain liable *as before the making of the act*:" and before the making of the act, the bankrupt was not discharged (136).

In a *sci. fa.* against one who has been twice a bankrupt, the plaintiff must allege that the estate

<sup>p</sup> Philpot and Corden, 5 T. R. 287.

might be made to the certificate under the second. *Ld. Hardwicke*, in a fair case on the part of the bankrupt, refused to supersede a commission, because it would injure the bankrupt, by defeating his *certificate entirely*. It should seem hard to construe it, as *against* him, to be a discharge, but no discharge for his *benefit*.

(136) Before the making of the act in question, the former acts, which had first introduced the discharge by certificate, were expired. In the case above cited, it was said that though the 4 and 5 Anne gave the bankrupt, upon his conformity, a *discharge* from his debts, yet that nothing was to be found relative to the *certificate* till the 5 Geo. 2. This is not quite correct, *historically*. The 4 and 5 Anne was the first act that gave the bankrupt any kind of discharge (sect. 8.), but it also for that purpose required (sect. 20.), a *certificate* of his conformity, signed by the *commissioners*. The 5 Anne, c. 22. added the further requisite, of being first signed by the *creditors*. This was adopted by the 5 Geo. 1. c. 24.; and lastly by the 5 Geo. 2. with the addition, of a clause making the certificate *evidence* of all the previous proceedings, and of some new exceptions to its validity, namely stock-jobbing, concealment, &c.

had

BOOK III.  
CH. VII.  
Sect. IV.

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had not paid fifteen shillings in the pound at the time of the action brought: because where the exception, (as in this act), is incorporated in the body of the clause, they must be pleaded together; he who would avail himself of the clause, must also negative the exception<sup>1</sup>.

But though the plaintiff must state every thing that entitles him to recover, it lies on the *defendant* to *prove* that his estate has produced sufficient to pay fifteen shillings; and supposing the proof lay on the plaintiff, yet presumptive evidence, such as the opinion of one of the assignees that the estate is not likely to pay fifteen shillings, will be conclusive, unless contradicted by the defendant<sup>2</sup>.

Producing a former commission and proceedings, and shewing that the bankrupt had submitted to it, and under which he had not paid fifteen shillings in the pound, is sufficient evidence as against the bankrupt, in assumpsit and plea of bankruptcy and certificate<sup>3</sup>.

3. *Of the effect in this country, of a certificate or discharge by the law of another; and of that of an English certificate, in other countries.*

It has been laid down as a general principle, that a discharge by the law of one country, will be a discharge in another; and therefore that a *cessio*

<sup>1</sup> Gill and Scrivens, 7 T. R. 27.

<sup>2</sup> Jeffs and Ballard, Bos. and Pull. 467.

<sup>3</sup> Haviland and Cooke, 5 T. R. 655.



*bonorum* in Holland, which is held a discharge in that country, will have the same effect here<sup>t</sup>.

BOOK III.  
CH. VII.  
Sect. IV.

So a certificate in Ireland, under the bankrupt laws of that country, will operate as a discharge in an action brought here upon a debt arising in Ireland<sup>u</sup>.

But it should seem, that the extent of the discharge, as to whether it shall be of the person or effects only, or of both, will be governed by the local law of the place where it arose<sup>x</sup>.

Though where the debt has arisen in a foreign country, the courts here, by the courtesy of nations, would give effect to a discharge by the law of that country, if the creditor were to attempt to enforce the contract here; the case would be totally different, if the debt being contracted in this country, the debtor attempted to evade the payment of it by withdrawing himself to a foreign country, there becoming a bankrupt, and afterwards setting up the bankrupt laws of that country, as a defence. And in a case of this kind, where a person being sued here for a debt contracted in this country, applied to be discharged upon common bail, on the ground of his having become a bankrupt in Ireland, and obtained his certificate there, the court refused to interpose in a summary way, and left him to take what advantage he could by plea<sup>y</sup>.

<sup>t</sup> Ballantine and Golding, Co.  
B. L. 515.  
<sup>u</sup> S. C.

<sup>x</sup> See Exp. Burton, 1 Atk 255.  
<sup>y</sup> Quin and Keeffe, 2 H. Bl.  
553.

BOOK III.  
CH. VII.  
SECT. IV.

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With respect to the effect of an English certificate, in actions commenced in any of the plantations, for debts due there before the bankruptcy, there is no decided case: but great names are cited, for *opinions* given by them as counsel, that it would not be a bar; as the laws of England, made since the plantations were settled, do not extend to them unless expressly named<sup>y</sup> (137).

In Scotland, the determinations upon the effect of an English certificate, seem to have turned upon the locality of the contract. Where the debt was made *payable* in England, or the *instrument* executed in England, in the English form, and made payable in England, it was considered as an English debt, and the certificate was allowed to be a bar; and in opposite circumstances, the reverse<sup>z</sup>.

#### SECT. V.

#### *Of the manner of the Bankrupt's availing himself of the Certificate.*

There are two modes pointed out by the statute, in which he may avail himself of the discharge

<sup>y</sup> Davis, Bt. Law, 439.

<sup>z</sup> Rothead and Scott, 3 vol. Dict. decis. p. 134. Marshall and Yeaman, Falc. decis. case

CXX. Christie and Straiton, ib. CXLI. Galbreath and Galbreath, 3 vol. New Coll. decis. XCII.

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(137) It seems equally doubtful, whether it would be a bar, even in such as have been settled, since the bankrupt laws.

given by the act; first by plea, and secondly by motion, according to the circumstances of his case.

BOOK III.  
CH. VII.  
Sect. V.

1. *By plea.*

If a bankrupt is sued for any debt due before he became bankrupt, he shall be discharged upon common bail, and may plead in *general* (138) that the cause of action accrued before the bankruptcy, and give the act and the special matter in evidence; and his certificate and allowance thereof according to the directions of the act, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if there is a verdict for him, or the plaintiff is nonsuited, or judgement is given against the plaintiff, the bankrupt shall recover his full costs.

This general plea opens the whole merits of the question in evidence on *both* sides; and a plaintiff, therefore, in an action upon a bond, to which bankruptcy is pleaded, may give the condition of the bond *in evidence*, to shew that he is not barred by the certificate<sup>a</sup>.

It is not necessary for the bankrupt, in pleading his certificate and that the cause of action accrued

<sup>a</sup> Allop and Price, Dougl. 155.

(138) The plea need not be signed by counsel. Leigh and Monteiro, 6 T. R. 496.

before



BOOK III.  
CH. VII.  
S. a. v.

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before the bankruptcy, to add, that he had conformed according to the bankrupt acts.\* The statute has directed this general pleading, and if he has not conformed, it is matter of evidence<sup>b</sup>.

A plea that defendant, before the action, became bankrupt within the meaning of the several statutes, &c. and that the said *indenture* (on which the action was brought), in the declaration mentioned, was *made before* he became bankrupt, concluding to the country; was, on a special demurrer because the plea did not allege that the cause of action accrued before the bankruptcy, held to be bad; first, as bad at common law, and next, as not warranted by the statute, which has prescribed a particular form of plea<sup>c</sup>.

A general plea, of bankruptcy and certificate *in Ireland*, referring to an Irish statute, and concluding to the country, in the same manner as the plea given by the 5 Geo. 2. with respect to English bankrupts, is bad<sup>d</sup>.

The *general* plea given by the statute, is only for the bankrupt: all others must plead in the same manner as before the statute. Such a general plea, therefore, by the *bail* of the bankrupt is bad; and it seems that they cannot avail themselves at all, by *plea*, of the bankruptcy of the prin-

<sup>b</sup> Willan and Giordani, Co. B. L. 528.

<sup>c</sup> Charlton and King, 4 T. R. 156.

<sup>d</sup> Quin and Keeffe, 2 H. Bla. 553.

cipal ; but ought to seek relief by an application to the summary jurisdiction of the court <sup>e</sup>.

BOOK III,  
CH. VII.  
Sect. V.

A regular judgment against the bankrupt, was set aside, to let in the plea of bankruptcy: the court thinking it would be hard to let him suffer by a neglect of his attorney, in a fair case where he had given up all his effects <sup>f</sup>.

2. *By motion.*

If the bankrupt, having obtained his certificate, is taken in execution or detained in prison by reason that judgment was obtained before the certificate was allowed; he may upon application to any one or more of the judges of the court wherein the judgment and execution against him has been obtained, and on producing his certificate allowed and confirmed, be discharged out of custody upon such execution.

This clause in the statute, has been considered as extending only to the *person* of the bankrupt; and that a judge had no authority under it, to discharge in this summary way, an execution against his *goods* <sup>g</sup> (139): but the party was in such cases, put to

<sup>e</sup> Donnelly and Dun, Bosc. and Pull. 446. Beddom and Holbrook, ib. 450. n.  
<sup>f</sup> Evans and Gill, ib. 52.

<sup>g</sup> Calcroft and Swan, Barnes 204. Ashdown and Fisher, ib. 206. Callen and Meyrick, 1 T. R. 361.

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(139) In the cases above cited from Barnes, the executions seem to have been after the certificate had been allowed: in

BOOK III.  
CH. VII.  
SECT. V.

---

to his *auditá querelá*<sup>h</sup>. This however was dispensed with in a very late case; and said to be the modern practice to interfere in a summary way in all cases where the party would be entitled to relief on an *auditá querelá*<sup>i</sup>.

But the court will not discharge the bankrupt upon motion, if his conduct appears to be fraudulent: as where the commission described the bankrupt as of a place, where he had never lived, so that the plaintiff never heard of the commission till after he had commenced his action<sup>k</sup>.

Or where the certificate appears to have been obtained by fraud<sup>l</sup>.

And if any thing is alleged to invalidate the effect of the certificate, the court will direct a trial on the plea of bankruptcy<sup>m</sup>.

<sup>h</sup> Calcroft and Swan, Barnes 204.

<sup>i</sup> Lister and Mundell, Bos. and Pull. 427.

<sup>k</sup> Sowley and Jones, Bl. 725.

<sup>l</sup> Vincent and Brady, 2 H. Bl. 1.

<sup>m</sup> Lister and Mundell, Bos. and Pull. 427.

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*Callen and Meyrick*, after the signing, but before the allowance. Mr. Cooke ingeniously suggests a doubt whether in such a case as the last-mentioned, the *goods* could be legally considered as the *bankrupt's*; the property of an uncertificated bankrupt belonging to his *assignees*.

The court, however, seems to have determined entirely upon the ground of the defect of their authority under the statute, to proceed in a *summary* way, with respect to the *goods*.



## CHAP. VIII.

*Of the Dividend, Allowance, and Surplus.*

## SECT. I.

*Of the Dividend.*


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1 *Ja. c. 15. f. 4.*

5 *Geo. 2. c. 30. f. 33. 37.*

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**A**LTHOUGH neither of these statutes *expressly* restrain the commissioners or assignees, from making a dividend, before a certain time after the issuing of the commission, yet as the former entitles creditors, coming in at any time within four months, and until distribution made, to partake equally with those coming in before, and says that if creditors come not in within the four months, *then* the commissioners to have power to distribute, it has been considered as in effect prohibitory in that respect; and that distribution *cannot* be made until the four months are expired<sup>a</sup>: and the latter statute seems to have intended the same thing, in directing that the assignees shall make a dividend, at some time *after* the *expiration* of four months and within twelve from the issuing of the commission.

BOOK III.  
CH. VIII.  
Sect. I.

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<sup>a</sup> *Rugle's ca. Hutt. 38. Com. Dig. tit. Bankt. D. 31.*

BOOK III.  
CH. VIII.  
Sect. I.

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They clearly are not compellable to make a dividend before that time; and Ld. Hardwicke, in a case where creditors filed a bill within the four months, to set aside some transactions of the assignees, with respect to the getting in of the effects, disapproved of it extremely, in so far as it went to make the court judges, how the estate should be distributed within the four months, and to change the method chalked out by the act, which *allows* the assignees a complete four months from the issuing of the commission, to make a dividend<sup>b</sup>.

A much more common case, however, which occurs, is that where the assignees neglect to make a dividend even after the four months are expired, and it becomes necessary to compel them.

As soon after that time as the assignees are able to make a dividend, they are not to wait till called upon by the creditors, but it is their duty of themselves to apply to the commissioners to appoint a meeting for that purpose<sup>c</sup>; and the commissioners may summon the assignees to shew cause why a dividend has not been made, and if they do not shew cause to the satisfaction of the commissioners, the commissioners may appoint a meeting for making one (140).

Where

<sup>b</sup> Cooper and Pepys, 1 Atk. 106.

<sup>c</sup> Treves and Townshend, 1 Bro. 384. S. C. Co. B. L. 280.

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(140) See Ld. Loughborough's order, 8th March 1794. This order directs a public notice in the gazette of the meeting for

Where real estate is to be sold, it is said that the way of proceeding is to have an order from the Ld. Chancellor to sell; that no statute authorizes the commissioners to decide whether it is to be sold or not; but that any one creditor has a right to have it sold and the produce divided; and that the court has no discretionary authority to prevent the sale<sup>d</sup> (141).

Though the effects should be so inconsiderable, that no one creditor may think it worth while to call upon the assignees to make a dividend, yet if they neglect to do it within a proper time, and are making a private advantage of the effects in their hands, they will be charged with interest<sup>e</sup>: and this usually at four *per cent.*, though it may be increased, according to circumstances; as where it appears they have made more of it<sup>f</sup>.

<sup>d</sup> Exp. Goring, 1 Vez. J. 168.

<sup>e</sup> Exp. Lane, 1 Atk. 90.

<sup>f</sup> Hilliard's ca. 1 Vez. J. 89.  
Treves and Townshend, 1 Bro.  
384.

for the assignees attending to shew cause, but it is generally done by a private summons; though this is attended with the inconvenience that the inquiry and examination being made in the absence of creditors, must necessarily be often very imperfect.

(141) The statute of Eliz. authorizes the commissioners to take by their discretions, order and direction with all the bankrupt's lands and goods, and to make sale, or otherwise order the same for true satisfaction and payment of the creditors, which seems to give the commissioners an *original* and general authority; though certainly subject, as in all cases, to the controul of the great seal.



BOOK III.  
CH. VIII.  
SECT. I.

And an assignee who has neglected to make a dividend in proper time, may be charged with interest; though the money has lain at a *banker's*, and he has not been paid interest for it<sup>g</sup>.

But the executors of an assignee are not looked upon in the same light as assignees; and, as executors, they are not expected to pay till called upon<sup>h</sup>.

Creditors coming in after a dividend, will be admitted, so as not to disturb the former dividend; and must be brought up equal with the creditors under the former, before the commissioners can proceed to make a second<sup>i</sup>.

It might seem to be proper to admit creditors, coming in after a dividend, to be brought up equal with the former, only under special circumstances, of which the court would judge; but it is the common practice to do so, without any order<sup>k</sup> (142).

When a dividend is declared, a creditor may either apply to the Ld. Chancellor, by petition, for an order upon the assignees to pay<sup>l</sup>; or he may recover it of the assignees at law in an action of assumpsit, in which the proceedings before the commissioners will be conclusive evidence of the debt:

<sup>g</sup> S. C. C.

<sup>h</sup> Treves and Townshend, ut supra.

<sup>i</sup> Exp. Stiles and Pickart, 1 Atk. 208.

<sup>k</sup> Exp. Long, 2 Bro. 50.

<sup>l</sup> Exp. White, 1 Atk. 90.

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(142) And generally, though it should seem improperly, without any enquiry as to the circumstances of laches or delay.  
which,

which, after it has been admitted before the commissioners, cannot be litigated but by an application to the great seal<sup>m</sup>.

BOOK III.  
CH. VIII.  
Sect. I.

An assignee, being only a trustee, must not blend his private affairs with those of the commission; and is not allowed therefore to stop a creditor's share of a dividend, for his own private debt to himself<sup>n</sup>.

## SECT. II.

*Of the bankrupt's Allowance.*


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5 Geo. 2. c. 30 s. 7, 8.

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The discharge of a bankrupt from his debts, after his trade is at an end, his credit annihilated, his effects seized, all power of disposing of them taken away from him, and the whole fund, out of which alone he could ever hope to pay his debts, surrendered to his creditors, without any reserve or concealment, may perhaps seem to be little more than an act of indispensable justice; but the allowance of a sum of money out of his own effects, for his future support and maintenance, and in order to put him again in a way of honest industry, does honour also to the liberality, of the modern law.

<sup>m</sup> Brown and Bullen, Dougl.  
392.

<sup>n</sup> Exp. White, 1 Atk. 90. but  
see Exp. Nockold, Co. B. L.  
531. contra.

BOOK III.  
CH. VIII.  
Sect. II.

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The direction of the Act is that the neat produce of his estate shall, after such allowance made, or *over and above such allowance*, be sufficient to pay ten shillings in the pound (or twelve shillings and sixpence, &c. as the case may be) to all the creditors who have proved under the commission. He is not entitled, therefore, to have his allowance until a final dividend is made; for as other creditors may come in before that time, it cannot, till then, be ascertained, whether he will be entitled to any allowance at all<sup>o</sup>.

Nor can he be entitled to it before he has had his certificate; for if the creditors should consent to give it him before, it would be of no service; as all property coming to him before he has had his discharge, is liable to satisfy his creditors, and they might take it from him again the next moment<sup>p</sup>.

And if he has not obtained his certificate when a final dividend is made, he will not be entitled to recover it of the assignees, though he obtains his certificate afterwards. The assignees, when they make such a dividend as would otherwise entitle him, are not bound to retain the allowance for him. He must first put himself in a situation to demand his allowance, by obtaining his certificate, before the dividend is paid<sup>q</sup>.

<sup>o</sup> Exp. Stiles and Pickart, 1 Atk. 308.

<sup>p</sup> Exp. Grier, 1 Atk. 207.

<sup>q</sup> Groome and Potts, 6 T. R. 548.



The allowance, whenever he becomes entitled to it, is a vested interest, and if he dies, will go to his representative<sup>\*</sup>.

BOOK III.  
CH. VIII.  
Sect. II.

## SECT. III.

*Of the Surplus.*


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13 Eliz. c. 7. s. 4. 8.

1 Ja. c. 15. s. 15.

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The commissioners are required, at the request of the bankrupt, to make a true declaration to him, of the application and disposal of his estate and effects; and to make payment of the overplus, if any, to the bankrupt himself or his representatives (143); and he is also empowered and authorized to recover and receive the rest of the debts outstanding.

This overplus directed to be paid to the bankrupt is only such as shall remain after his debts are *fully paid and satisfied*.

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<sup>\*</sup> Exp. Trap. 1 Atk. 208. Exp. Calcot, ib. 209.

(143) Except where such overplus arises by the forfeitures given by the act: in which case, one moiety of the overplus of the forfeitures is given to the crown, and the other to the poor in the hospitals, &c. So strict and so minute were the old acts.

BOOK III.  
CH. VIII.  
S. & III.

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If, therefore, there is a surplus, after paying twenty shillings in the pound, creditors whose debts carry interest, and who, if the estate had been deficient, would have had interest only to the date of the commission, will be entitled to the interest accrued since, before any thing can come to the bankrupt<sup>1</sup>. The certificate, though it discharges the person, and any future effects the bankrupt may acquire after it, does not discharge the fund in the hands of the assignees; and if this increases, and becomes productive in their hands, so as to pay twenty shillings in the pound, with a surplus, it still remains liable to the creditors until they are completely satisfied<sup>2</sup>. Till then, the creditors have a right to retain it against any claim that the bankrupt can set up.

With respect to the kind of debts, upon which such subsequent interest will be allowed, the same rules have been laid down, as have been already mentioned with respect to interest upon debts in the case of an insolvent estate (145). Besides, therefore, the cases of interest expressly stipulated upon the face of the instrument, it has been allowed, where there was other evidence of a contract for it, though not reserved in express terms. As upon debt for goods sold; where there was evi-

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<sup>1</sup> Bromley and Goodere, 1 Atk. 75.

<sup>2</sup> S. C. and see Exp. Mills, 2 Vez. J. 295.

(145) See above, Chap. III. Sect. II. title *Interest*.

dence

dence of an original contract, partly from the custom of the trade, but especially from accounts having been settled between the parties, on which it had been mutually allowed<sup>u</sup>. So upon loans of money by a banker, on the bankrupt's notes; though interest was not mentioned in them, but the bankrupt appearing to have paid it, and settled accounts on that footing<sup>x</sup>.

But such subsequent interest will not be allowed, so as to break in upon the bankrupt's allowance<sup>y</sup>.

Nor interest upon interest<sup>z</sup>.

<sup>u</sup> Exp. Champion, 3 Bro. 348.

<sup>y</sup> Exp. Morris, 3 Bro. 79.

<sup>x</sup> Exp. Hankey, 3 Bro. 594.

<sup>z</sup> S. C. 1 Vez, J. 132.

Exp. Mills, 2 Vez, J. 295.



## BOOK THE FOURTH.

OF SUITS, AND OTHER PROCEEDINGS, AT LAW  
AND IN EQUITY.

## CHAP. I.

*At Law.*

## SECT. I.

*Of actions by and against the Bankrupt.*

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5 Geo. 2. c. 30. s. 23.

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BOOK IV.  
CHAP. I.  
Sect. I.  

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**A**LTHOUGH all acts, in relation to his property, done by a bankrupt after an act of bankruptcy, may be avoided by the assignees, (subject to certain exceptions by express statute); yet the bankrupt is still capable of maintaining actions, and no one can take advantage against him, by plea of his bankruptcy, before the commission and assignment under it; the legal property remaining, till actual assignment, in the bankrupt himself<sup>a</sup>.

And although he has been declared a bankrupt, by the commissioners; yet neither he, nor any other, is bound by their determination; but he may contest his bankruptcy in an action. He may have trespass against the assignees, or other persons acting under the commissioners, if he was not liable to a commission<sup>b</sup>.

<sup>a</sup> Andrews and Spicer, 3 Keb.  
616. Cary and Crisp, 1 Salk.  
108. Harvey and Williams,

Ld. Raym. 496.

<sup>b</sup> Perkin and Proctor, 2 Wils.  
382.

He may even submit to his commission in the first instance; yet still protesting that he is no bankrupt, he may notwithstanding, within a proper time, bring an action against his assignees. But the court may enjoin him from proceeding or not, according to the length of time and manner of his acquiescence, and other circumstances of the case<sup>c</sup>.

And if the petitioning creditor's debt shall not be really due, or it cannot be proved that the party was a bankrupt, but on the contrary it shall appear that the commission was taken out fraudulently or maliciously, the Lord Chancellor shall, upon petition of the party grieved, examine into the same, and order *satisfaction* to be made to him for the damages sustained by him; and for the better recovery thereof, may, if there be occasion, assign the bond given by the petitioning creditor, on which the party may sue in his own name.

It is discretionary in the Chancellor either to direct an inquiry before the master, of such damages, or an issue at law; and after the damages have in either way been ascertained, he may then for the better recovery thereof, order the bond to be assigned: or in a flagrant case, he may without any previous inquiry into the damages, assign the bond in the first instance<sup>d</sup>.

And in an action at law upon the bond, the assignment of it by the Lord Chancellor, is conclusive evidence of the fraud or malice<sup>e</sup>.

<sup>c</sup> Flower and Herbert, 2 Vez.  
326.

<sup>e</sup> Smith and Broomhead,  
7 T. R. 300.

<sup>d</sup> Exp. Gayter, 1 Atk. 144.

BOOK IV.  
CHAP. I.  
Sect. I.

The party, however, is not confined to his remedy only on the bond. He may bring an action at law for what damages he may have sustained; for the statute does not take away the common law remedy, nor say that he shall not recover more than the sum of two hundred pounds mentioned in the statute<sup>f</sup>.

Even after a regular commission has been taken out, he is not disabled from maintaining actions to recover property acquired by him *after* the bankruptcy. For although till he obtains his certificate, all such property is liable to be taken from him again by the assignees, yet no other person but his assignees can avail themselves of the objection. Against a stranger, he may maintain *trover*, for goods acquired after the bankruptcy<sup>g</sup>. He may maintain *assumpsit*, for the profits of his personal labour<sup>h</sup>; for work and labour and *materials found*, incident and necessary to the labour<sup>i</sup>; and even for *money lent and advanced*, it being presumed that being after the bankruptcy, it might be money earned by his labour<sup>k</sup> (146). This is as to his capacity of contracting, or suing in his *own* right.

But

<sup>f</sup> Brown and Chapman, Burr. 1418.

<sup>g</sup> Fowler and Down, Bos. and Pull. 44. Webb and Fox, 7 T. R. 391.

<sup>h</sup> Chippendale and Tomlinson, Co. B. L. 462.

<sup>i</sup> Silk and Osborn, Esp. N. P. 140.

<sup>k</sup> Evans and Brown, *ibid.* 170.

(146) And why not debt, or any action founded on contract relative to property acquired subsequent to the bankruptcy. In the case of Eckhardt and Wilson, 8 T. R. 140. where to

*assumpsit*



But as to any political capacities, or rights vested in him *alieno jure*, the bankruptcy creates no disability at all. He may continue to act in the capacities of executor or administrator, or other trustee (147): and in these capacities, may prove debts under commissions against other persons; and may even be an assignee under his own commission, and sign his own certificate (148).

BOOK IV.  
CHAP. I.  
Sect. I.

So the bankruptcy does not discharge him from the office of overseer of the poor<sup>1</sup>.

He may continue to carry on suits as an attorney<sup>m</sup>.

Being committee of the person of a lunatic, his bankruptcy, though it may be sufficient cause to remove him on account of the fund for maintenance, is no ground for changing the custody of the person<sup>n</sup>.

Till, however, he has obtained his certificate, he is liable to be sued and arrested by his creditors, though they have come in under the commission; and in that case a court of law will not interpose,

<sup>1</sup> Egginton's ca. 1 T. R. 369.      son. And see 2 Vez. J. 68.

<sup>m</sup> Chippendale and Tomlinson.      <sup>n</sup> Exp. Mildmay, 3 Vez. J. 2.

*assumpsit* by several partners, the plea of bankruptcy of one of the plaintiffs was sustained, and where the court distinguished it from the cases of Fowler and Down, and of Webb and Fox, as being an action on a contract, while those were in trover; it may be observed that the promises were before the bankruptcy. The statute which disables a bankrupt from recovering debts due to him, plainly relates to debts due before the bankruptcy.

(147) See above, p. 221, &c.

(148) See above, title *Certificate*, p. 374.

upon

BOOK IV.  
CHAP. I.  
Sect. I.

upon that ground, to discharge him: he must apply to the court of Chancery<sup>o</sup> (149).

A court of law will not discharge him from an execution at the suit even of the petitioning creditor: the proper jurisdiction being the court of Chancery, which may either discharge the bankrupt, or supercede the commission; but there would be an inconsistency in a court of law discharging an execution because of a commission being taken out by the creditor, when perhaps the Lord Chancellor might supercede the commission because he had taken the bankrupt in execution<sup>p</sup>.

#### SECT. II.

#### *Of actions by Assignees.*

#### I. *Form of action, Pleading, &c.*

1 Ja. c. 15. s. 13. 16.

In actions brought by assignees they may declare shortly, without setting forth the commission and proceedings at large<sup>q</sup>.

A declaration in *sci. fa.* by assignees, stating that the party became bankrupt within the meaning of the several statutes, &c. and that his goods and effects were in due manner assigned to them, &c. is sufficient without stating the commission, trading,

<sup>o</sup> Hill and Reeves, Bof. and Pull. 424. Oliver and Ames, 8 T. R. 364.

<sup>p</sup> M'Maffer and Kell, Bof. and Pull. 302.

<sup>q</sup> Ld. Kaym. 1548.

(149) See Book III. Chap. III. Sect. III. title *Creditors proceeding at law.*

act of bankruptcy, manner of the assignment, &c.  
A scire facias is the same as an action <sup>n</sup>.

BOOK IV.  
CHAP. I.  
SECT. II.

In debt on specialty, they need not make proof of the deed, because they are in by act of law, and may not have the means of obtaining the obligation <sup>o</sup>.

But the assignment does not alter the nature of the debt; and they can only have the same action that the bankrupt could have had <sup>p</sup>.

So if a bond is made to a trustee in trust for one who becomes a bankrupt, the assignees cannot bring the action in their own name, but must sue in the name of the trustee <sup>q</sup>.

In covenant for rent, upon indenture, by the assignees of lessor a bankrupt, the lessee is estopped to plead, that lessor *nil habuit in tenementis* <sup>r</sup>.

In assumpsit the promise may be laid either to the bankrupt or to the assignees <sup>s</sup>; but the right way of declaring is to lay the promise to have been made to the bankrupt; except there has been an express promise to the assignees <sup>t</sup>.

In an action upon a contract made by the bankrupt before the bankruptcy, the assignees must state themselves in the declaration to be assignees. But on contracts made by him after it, while uncertificated, and while therefore he can have no pro-

<sup>n</sup> Winter and Kretchman, 2 T. R. 45.

<sup>o</sup> Gray and Feilder, Cro. Car. 209.

<sup>p</sup> Morgan and Green, ib. 187.

<sup>q</sup> 1 Atk. 193.

<sup>r</sup> Parker and Manning, 7 T. R. 537.

<sup>s</sup> Fashion and Dormet, 7 Vin. 139. Rig and Wilmer, Stra. 697.

<sup>t</sup> Anon. 6 Mod. 131.



perty of his own, but all belongs to his assignees, and contracts entered into by him, may be considered as contracts by him merely as their agent and on their account, they need not state themselves to be assignees<sup>1</sup>.

For goods sold or delivered, or money paid, by the bankrupt or an agent of the bankrupt, after the bankruptcy, the assignees may bring either trover, avoiding the contract; or debt or assumpsit, affirming it<sup>2</sup>. If the former, they may recover the full value, though they may have sold only for half; if the latter, they can only recover what the goods sold for, or the party really received<sup>3</sup>; and the defendant will have the same advantages in his defence as he would in an action brought by the party himself<sup>4</sup>.

But whether they bring the one or the other, they cannot affirm the same transaction in one part as a contract, and disaffirm it in the other as a tort. If they take back part of the property, accepting it as part of the bankrupt's estate, in diminution of so much of their demand, they cannot recover in trover for the residue<sup>5</sup>.

And having elected to bring the one action, they shall not afterwards bring the other<sup>6</sup>. So assignees having in one action recovered money paid by a banker, upon the bankrupt's drafts, in

<sup>1</sup> Evans and Man, Cowp. 570.

<sup>2</sup> Hufsey and Fiddal, 12 Mod.

324. Read and Vaughan, 7 Mod. 461.

<sup>3</sup> King and Leith, 2 T.R. 141.

<sup>4</sup> Smith and Hodson, 4 T.R.

211.

<sup>5</sup> Wilson and Poulter, Stra.

860.

<sup>6</sup> 12 Mod. 324.

favour of a creditor, after notice of the bankruptcy, cannot maintain an action also against the creditor to whom the banker paid the drafts. Having disaffirmed the payments made by the banker, considering them as made not with the money of the bankrupt, but their own money, they shall not in a subsequent action treat them as payments made with the money of the bankrupt<sup>b</sup>.

If a sheriff takes the bankrupt's goods in execution, after an act of bankruptcy, and before the commission, but sells them after the commission; the assignees may have *trover* against him, but not *trespass*. The relation of the act of bankruptcy under the bankrupt laws, only vests the *property* in the assignees, from that time; but does not make the original taking before a commission issued, unlawful; or the sheriff a trespasser *ab initio*: but the selling afterwards is a wrongful conversion<sup>c</sup>.

And, against the vendee of the sheriff, or the plaintiff in the original action, if he has received the money; they may have *trover*, or *assumpsit*, at their election; but having elected the one kind of action, and had judgment, it is a bar to the other<sup>d</sup>.

If the sheriff proceed to levy, after notice of the act of bankruptcy, though no commission be taken out, he will be liable to the assignees; but

<sup>b</sup> Vernon and Hanfon, 2 T. R. 287.

<sup>c</sup> Cooper and Chitty, Burr.

20. Bl. 65. Smith and Milles, 1 T. R. 475.

<sup>d</sup> Hitchin and Campbell, Bl. 827. 3 Will. 304.

BOOK IV.  
CHAP. I.  
Sect. II.

---

if he has no notice, as he has a right to levy, he is bound to pay over to the party at whose suit the execution is. The whole is but one act, and it would be inconsistent to say that he had levied legally, but paid it illegally<sup>e</sup>.

They may have trover against the party suing, if proved a party to the conversion, by giving bond to the sheriff, and so making it his own act<sup>f</sup>; or if he accompany the officer in levying, though he has never received either the goods or their value from the sheriff<sup>g</sup>.

A sheriff is safe, if he pays without notice; and where an officer conducts himself fairly, and is under real difficulties how to act, the court will help him as far as possible; but will not take notice of a commission in a collateral way, so as to stay proceedings against him in an action for a wilful false return, pending which action, he pays over to assignees, monies levied by him after an act of bankruptcy, and kept in his hands a length of time upon frivolous pretences<sup>h</sup>.

The court will, in favour of the sheriff, take his return of a writ, as made at the time when made in fact, and not as at the return of the writ. A *fi. fa* returnable the 26th of June, after an arrest, which became an act of bankruptcy by a subsequent lying two months in prison; but before

<sup>e</sup> Vernon and Hankey, 2 T. R. 121, 122.

<sup>f</sup> Bull. N. P. 41.

<sup>g</sup> Menham and Edmonston, Bos. and Pull. 369.

<sup>h</sup> Timbrell and Mills, Bl. 205.



the commission, which issued the 5th of July: being returned *nulla bona* on the 5th November, was held good<sup>1</sup>.

BOOK IV.  
CHAP. I.  
Sect. II.

The court will not assist the assignees, in giving effect to the relation of the bankruptcy, upon motion; so as to make the sheriff pay over to them money levied after an act of bankruptcy by lying two months in prison, but before the two months were expired, and where the money had been paid over before the commission<sup>k</sup>.

## II. Evidence.

### 1. *Of the evidence required to support or defeat a Commission, generally.*

In actions by assignees, they must prove the trading, the act of bankruptcy, the commission regularly granted, the assignment, and property in the bankrupt<sup>l</sup>.

The proof of the commission must be by shewing it under seal, the petition on which it was granted, and the petitioning creditor's debt. The assignment is to be proved by producing the deed, and proving the execution of it by the commissioners<sup>m</sup>.

The petitioning creditor's debt being upon bond, proof of the acknowledgment of the debt by the

<sup>1</sup> Coppendale and Bridgen, Burr. 814.

<sup>l</sup> Bull. N. P. 37.

<sup>m</sup> Ibid. 41.

<sup>k</sup> Clarke and Ryal, Bl. 642.

BOOK IV.  
CHAP. I.  
SECT. II.

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bankrupt, does not supersede the necessity of calling the subscribing witness; for assignees must prove it by the same evidence as would be necessary in an action against the bankrupt; in which case it would be necessary to produce the subscribing witness, unless it appeared his attendance could not be procured<sup>n</sup>.

But if the execution of a deed, on which the assignees found as an act of bankruptcy, in an action against the *party to the deed*, was admitted by the party on examination before the commissioners, such examination is sufficient evidence of the execution, and supercedes the necessity of calling the subscribing witness<sup>o</sup>.

Where assignees sue upon contracts expressly made to themselves, or made by the bankrupt as their agent, and they do not declare as assignees, they need not go into evidence of the trading, act of bankruptcy, &c<sup>p</sup>.

In trover against a sheriff, or the party suing out execution after an act of bankruptcy, there is no occasion for an actual demand, because the property being vested in the assignees from the time of the bankruptcy, the execution was tortious<sup>q</sup>.

To defeat a commission, it is not sufficient alone, to shew an act of bankruptcy, before the

<sup>n</sup> Abbot and Plumbe, Dougl.  
205.

<sup>o</sup> Bowles and Langworthy, 5  
T. R. 366.

<sup>p</sup> Evans and Mann, Cowp.  
570. Ashurst J.

<sup>q</sup> Bull. N. P. 41.

petitioning

petitioning creditor's debt accrued ; without shewing also a sufficient petitioning creditor's debt, subsisting at the time of such previous act of bankruptcy<sup>r</sup>.

BOOK IV.  
CHAP. I.  
SECT. II.

In an action brought by the assignees under a first commission to try the property of goods left by them in the possession of the bankrupt, and claimed by the assignees under a second commission, Ld. Mansfield thought that the plaintiffs, having proved a debt under the second commission, could not question the *validity* of the second commission, though they might the *time* of the act of bankruptcy<sup>s</sup>.

But where a creditor of the bankrupt having obtained money or goods from the bankrupt before the commission, in part discharge of his debt, proved the remainder under the commission, Ld. Kenyon held that in an action against him by the assignees for the money or goods, he might impeach the validity of the commission<sup>t</sup>.

## 2. *Of the evidence of Creditors.*

A creditor cannot be a witness for the assignees, because he is interested to increase his own dividend<sup>u</sup>. Nor upon an issue out of Chancery to try whether the bankrupt had gamed, can he be a wit-

<sup>r</sup> Parker and Manning, cited  
Esp. N. P. 597.

<sup>s</sup> Walker and Burnell, Dougl.  
305.

<sup>t</sup> Stewart and Richman, Esp.  
N. P. 108.

<sup>u</sup> Eggletham and Haines, 12  
Vin. 11.



BOOK IV.  
CHAP. I.  
Sect. II.

ness to prove the gaming; for his dividend would be the larger, by the bankrupt's forfeiting his allowance<sup>x</sup>.

But he may be a witness for the assignees, if he releases to them; and it is not necessary the release should be also to the bankrupt<sup>y</sup>.

3. *Of the evidence of the Bankrupt, or of declarations made by him.*

*To property.*—The bankrupt cannot be a witness for the assignees, to prove property in himself, or a debt due to himself; unless he has obtained his certificate and released the assignees<sup>z</sup>. For he is interested to enlarge the fund, for the sake of the surplus, or his allowance<sup>a</sup>.

But he is a good witness against them, to prove property in, or a debt due to another, for it is manifestly against his interest to diminish the fund; as it tends not only to defeat his allowance, but to displease all his other creditors<sup>b</sup>.

In a *qui tam* action on the statute of usury, against a creditor who had proved the debt in question under the commission, and was chosen an assignee, it was held, that the bankrupt, being uncertificated, could not be a witness to prove the usurious contract and taking; though he was ready to release

<sup>x</sup> Shuttleworth and Bravo, St a. 507.

<sup>y</sup> Ambrose and Clendon, Ca. temp. Hardw. 267.

<sup>z</sup> Ewens and Gould, Bull. N. P. 43.

<sup>a</sup> Butler and Cooke, Cowp. 70.

<sup>b</sup> Same cases.

to the assignees all benefit from the increase of the fund, to arise by that debt being expunged, and also from all claims whatever to allowance or surplus. For that a release is only applicable to a debt due to the bankrupt; and the prospect of obtaining a certificate by increasing his fund was an interest which rendered him incompetent. And till he obtained his certificate, the creditor, notwithstanding he had proved under the commission, might bring an action at law, and arrest him for the whole debt<sup>c</sup>.

Bankrupt under a second commission, cannot be a witness for the assignees under it, to prove a debt due to his estate; even with a release, unless he has paid fifteen shillings under the second: for he is interested both in the surplus, and the discharge of his future effects<sup>d</sup>.

A bankrupt having had his certificate and his allowance, the court suffered his evidence to be read, thinking him not bound to refund<sup>e</sup>.

To the *act of bankruptcy*.—The statutes consider bankruptcy as a crime; and the bankrupt cannot be called either before or after his certificate, to prove his own act of bankruptcy<sup>f</sup>; but he may be called, against the assignees, to disprove it, or to

<sup>c</sup> Masters and Drayton, 2 T. R. 496.

<sup>d</sup> Kennet and Greenwollers, Peake N. P. 3.

<sup>e</sup> Ruffel and Ruffel, 1 Bro. 269.

<sup>f</sup> Field and Curtis, Stra. 829. Ewens and Gold, Bull. N. P. 40.

explain

BOOK IV.  
CHAP. I.  
Sect. II.

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explain a doubtful act<sup>g</sup>. And though he cannot prove his own act, yet what was said by him at the time, and before his bankruptcy, in explanation of an act done by him, is evidence<sup>h</sup>.

A verdict, upon an issue out of Chancery, to which only one of the defendants was a party, may be read against all the defendants, to prove the *time* of an act of bankruptcy<sup>i</sup>.

To *support the Commission*.—He is not competent to prove the petitioning creditor's debt, or any other fact necessary to support the commission; whether before or after his certificate. If before, he is interested by the prospect of obtaining it; if after, by the fear of defeating it<sup>k</sup>.

But an acknowledgment by him of the petitioning creditor's debt, is good evidence, if made before the commission<sup>l</sup>.

#### 4. *Of the depositions and proceedings under the Commission.*

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5 Geo. 2. c. 30. s. 41.

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The depositions and other proceedings, are not of a public nature, but taken by the commissioners

<sup>g</sup> Oxlade and Perchard, Esp. N. P. 287.

<sup>h</sup> Bull. N. P. 40. Bateman and Bailey, 5 T. R. 512.

<sup>i</sup> Lowfield and Bencroft, Bull. N. P. 40.

<sup>k</sup> Chapman and Gardner, 2 H. Bl. 279. Crofs and Fox, and Flower and Herbert, cited ib.

<sup>l</sup> Dowton and Crofs, Esp. N. P. 168.

for



for their own security and direction. A court of law will not order, to a defendant in a suit by the assignees, a copy of his examinations before the commissioners<sup>m</sup>.

In trover, the defendant being charged with his confession, in depositions before the commissioners, he was not allowed to go into parol evidence to *explain* it<sup>n</sup> (150).

An old witness was allowed to refresh his memory, by recurring to his depositions of the act of bankruptcy; considering them as memorandums made at the time<sup>o</sup>.

The statute directs that the commission, depositions or any part of them, certificate, or any other matter or thing relating to the commission or the proceedings thereupon, may be entered of record, upon the petition of *any* person, to the Great Seal: and which record, in the case of the death of witnesses, or the commission, &c. being lost or mislaid, shall be evidence of such commission, bankruptcy, &c. (151)

<sup>m</sup> Bracy's ca. Ld. Raym. 153.

<sup>o</sup> Vaughan and Martin, Esp.

<sup>n</sup> Wilson and Pouiter, Stra. N. P.

(150) Not to *explain* it?

(151) The inaccuracy observed by Mr. Douglas, in this statute's omitting the direction as to the manner of signing and attesting the entries (Dougl. 245. n.), is the more remarkable, as the like error was pointed out before, in the stat. of the 5 Geo. 1. c. 24. s. 31. (See Goodinge's Appendix, p. 45.)

The

BOOK IV.  
CHAP. I.  
Sect. II.

The depositions, recorded according to the directions of the statute, are evidence in an action, to prove the precise time of the act of bankruptcy, if specified therein <sup>p</sup>. And the statute is not meant only for the benefit of purchasers under a commission, but also of the creditors <sup>q</sup>.

### SECT. III.

#### *Of assignees Proceeding in suits &c. Commenced before the bankruptcy.*

An action does not abate, by the bankruptcy, either of plaintiff or defendant <sup>r</sup>.

But the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings; but it must be immediately after judgment, either interlocutory or final <sup>s</sup>. Where, therefore, pending a writ of error, the defendant in error became bankrupt, and the assignees sued out a *scire facias quare executionem non*, it was quashed partly on this ground. The assignees should have gone on with the writ of error, in the bankrupt's name till judgment <sup>t</sup>.

The court, however, will assist the assignees, by giving effect, as far as it can, to acts done by the bankrupt which appear to be for the benefit of the

<sup>p</sup> Janſon and Wilſon, Dougl.

244.

<sup>q</sup> S. C.

<sup>r</sup> Hewitt and Mantell, 2 Willf. 372.

<sup>s</sup> Kretchman and Breyer, 1

T. R. 463.

<sup>t</sup> S. C.

creditors.

creditors. After interlocutory judgment, and writ of enquiry awarded, the plaintiff having become bankrupt, and the writ of enquiry executed in his name, on motion by defendant to set it aside, on the ground that the assignees should have sued out a *sci. fa.*, the court refused, for the injury to creditors; as the defendant would have been superfluous, if the plaintiff had not been permitted to proceed to final judgment in the term<sup>u</sup>.

And upon the final judgment, the assignees having brought a *sci. fa.* to have execution, and the objection being urged, of the want of a *sci. fa.* by the assignees after the interlocutory judgment; it was held, that the objection did not lie in the mouth of the defendant in answer to the assignees, who by their *sci. fa.* upon the final judgment, affirmed the acts of the bankrupt in proceeding to final judgment: but that perhaps it might have been good, if the bankrupt himself had brought a *sci. fa.* because after the bankruptcy, perhaps he could have no legal right to have execution, all his rights being transferred to his assignees<sup>x</sup>.

But the court will not always put the assignee to the delay and expence of suing out a *sci. fa.*

A plaintiff having recovered a judgment in *sci. fa.* upon a former judgment, and be-

<sup>u</sup> Bibbins and Mantell, 2 Will.  
358. And see Waugh and Auf-  
ten, 3 T. R.

<sup>x</sup> Hewitt and Mantell, 2 Will.  
372.



BOOK IV.  
CHAP. I.  
SECT. III.

coming bankrupt, the assignees of the original judgment was allowed, upon motion, to enter it; to entitle him to the benefit of the judgment on the *sci. fa.* without putting him to bring a new *sci. fa.*<sup>1</sup>.

A plaintiff becoming bankrupt after the cause was at issue, and notice of trial given, the court, upon motion by the assignee, permitted it to go on in the bankrupt's name, the assignee giving security for the costs<sup>2</sup>.

But as between the bankrupt and the assignee, the case may be different, and the court may not take notice of the bankruptcy, in a collateral way. A plaintiff, after obtaining judgment, having become bankrupt, and sued out execution; and the sheriff having levied the money, and brought it into court: the court would not order it to be paid to the assignee; but detained it, till he should try the bankruptcy on a *sci. fa.*<sup>3</sup>.

<sup>1</sup> Plummer and Lea, 5 Mod 88.

<sup>2</sup> Priddle and Thomas, cited

<sup>3</sup> Willf. 373.

<sup>1</sup> Monk and Morris, Vent.

193. S. C. 1 Mod. 93.

## CHAP. II.

*Of Suits, and other Proceedings, in Equity.*

## SECT. I.

*Of the Jurisdiction.*1. *Of the Commissioners.*

THE commissioners have an equitable jurisdiction, as well as a legal one; for they have full power and authority to take, by their discretions, such order and direction as they shall think fit <sup>a</sup>.

BOOK IV.  
CHAP. II.  
SECT. I.

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Their determinations, when uniform, have met with attention from the courts; and in questions upon the construction of the statutes, have been considered as the *contemporanea expositio*, and in some instances relied on, both in courts of law and equity, to ascertain the rule of construction <sup>b</sup>.

With respect to the competency of witnesses, or admissibility of evidence, in examinations taken before them, it may be observed, that their business being principally enquiry, and their examinations mostly *exparte*; and even in the cases where they have to *decide* upon the *rights* of parties, being

<sup>a</sup> 1 Atk. 77.

<sup>b</sup> 1 Atk. 77, 8, 9. 140. 151.  
Cowp. 543, 4.

empowered

BOOK IV.  
CHAP. II.  
SECT. I.

empowered to do so not only by extrinsic evidence but by examination of the parties themselves, there seems to be no room, in examinations before them, for objections on the ground of interest; as there is in the case of suits at law or in equity.

From their determination, an appeal lies to the great seal, by petition <sup>d</sup>. But a party ought not to petition for an order upon the commissioners, without going before them in the first instance; nor without stating in his petition, what passed before them <sup>e</sup>.

## 2. *Of the Great Seal.*

Over the commissioners, the assignees, the petitioning creditor, and the whole of the proceedings, in every step from the opening to the final dividend and superseedeas, the Lord Chancellor exercises a general superintendence and control.

In cases of bankruptcy, he may determine in a summary way, and exercise a discretionary power <sup>f</sup>; but this is only in transactions between creditors and assignees; he cannot, on petition, adjust private demands between assignees, independent of the rest of the creditors <sup>g</sup>.

And even upon petitions, he determines by way of analogy to the usual and ordinary proceedings in the court of Chancery <sup>h</sup>.

<sup>d</sup> 1 Atk. 77.

<sup>e</sup> Exp. Wright, 2 Vez. J. 41.

<sup>f</sup> 3 Atk. 817.

<sup>g</sup> 1 Atk. 88.

<sup>h</sup> 3 Atk. 817.



The Chancellor sitting in bankruptcy, cannot restrain a common creditor from suing at law, or order him to discharge the bankrupt; but in the case of the petitioning creditor, he may, as the latter submits himself to the orders of the Court<sup>i</sup> (152).

BOOK IV.  
CHAP. II.  
SECT. I.

Where the solicitor under a commission arrested the bankrupt at the suit of the petitioning creditor; and then charged him in another action at the suit of another creditor; as the first arrest was improper, and appeared to be merely a contrivance to found the arrest at the suit of the other, the court discharged him of both<sup>k</sup>.

The court of Chancery will not, upon petition, interfere in a proceeding proper for a court of law: as, to make the clerk of the commission pay costs for not attending with the proceedings, on a trial at law, whereby the bankrupt was acquitted on an indictment for concealment. The party must proceed by indictment or information<sup>l</sup>.

The Chancellor will determine, upon petition, on the legality of a commitment by the commissioners; though the party might have a habeas corpus<sup>m</sup>; but he cannot discharge the process of a court of law, in a summary way<sup>n</sup>.

<sup>i</sup> Exp. Callow, 3 Vez. J. 1.

<sup>l</sup> Exp. Holliday, 1 Atk. 209.

<sup>k</sup> Exp. Wilson, 1 Atk. 152.

<sup>m</sup> 1 Atk. 242.    <sup>n</sup> *Ibid.* 239.

(152) *Qu.* Whether he might not in the case of an *assignee*; who is considered as an officer of the court, and an officer under the commission. (1 Atk. 91.)

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As in proceeding by petition, there is no appeal from the Chancellor's determination, so bills are frequently brought in matters of difficulty or importance; but upon petitions, he proceeds upon the same rules, as upon causes coming before him upon bill; namely, *the rules of equity*°.

But upon bill, he has no jurisdiction to reverse an order of the commissioners; as to which, the course is by petition. Where, therefore, after judgment by default in an action upon an order of dividend under a commission, the assignees filed a bill for discovery, and to have the proof of the debt expunged; a demurrer generally to the discovery and relief, was allowed<sup>p</sup>.

## SECT. II.

*Suits by and against Assignees, &c.*

Where there are proper persons to get in the estate of another, as the assignees of a bankrupt, a court of equity will not suffer the creditors of the bankrupt to bring a bill in equity to get in the estate, unless where the assignees collude with the debtor, when a creditor may be allowed to bring a bill, and charge the assignees with such collusion<sup>q</sup>.

° 1 Atk. 76, 78.

<sup>p</sup> Clarke and Capron, 2 Vez.

J. 666.

<sup>q</sup> Franklyn and Fern, Barn.

Ch. Rep. 30.

And if assignees refuse to bring a bill that is for the benefit of the estate, any creditor has a right to do it under peril of costs<sup>r</sup>.

BOOK IV.  
CHAP. II.  
Sect. II.

A majority of the creditors being against a suit in equity, for the redemption of a mortgage, the bill was brought by the rest. And the assignees being willing it should be redeemed though they could not bring the bill against the consent of the majority, the redemption was decreed; and that the assignees should be at liberty, in the first place, to redeem, and in default, then that the plaintiffs might<sup>s</sup>.

A purchaser for a valuable consideration without notice of the act of bankruptcy, shall not be obliged in equity, to discover any thing that may hurt his title; not only where he has a prior legal estate, but also where he has a better title or right to call for the legal estate, than the other<sup>t</sup> (153).

To a bill for discovery of bankrupt's estate, demurrer because the bankrupt was not made a party was formerly allowed<sup>u</sup>; but this has been

<sup>r</sup> S. C.

<sup>s</sup> S. C. *ibid*.

<sup>t</sup> *Abery and Williams*, 1 *Vern.*

27. *Wilker and Bodington*, 2

*Vern.* 599. *Collet and Degolis*,

*Forr.* 65. and cases there cited;

<sup>u</sup> *Sharpe and Gamon*, 2 *Vern.*

32.

(153) For the qualifications of this rule, see the cases above cited. May not discovery be had by examination before the commissioners; which seems to be different from the case of a party's praying the aid of a court of equity?



BOOK IV.  
CHAP. II.  
SECT. II.

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since over-ruled, and held not necessary that bankrupt should be a party to a bill against assignees<sup>x</sup>.

To a bill against bankrupt and assignees, charging a fraudulent commission by confederacy to defeat plaintiff's execution, and praying a discovery, and injunction against an action threatened by the assignees; a demurrer by bankrupt, because not concerned in interest, and because the discovery was matter of evidence between the other parties, to which he might be examined as a witness, was disallowed: the bankrupt being a material party against whom a decree might be made, in respect of the fraud<sup>y</sup>.

A creditor upon debt accruing after the bankruptcy, and therefore not barred by the certificate, filed a bill against the executor and the assignees of a certificated bankrupt deceased, for an account, suggesting a surplus, and future property. Demurrer by the assignees, allowed; they being liable only to the executor, and the executor to the creditor<sup>z</sup>.

Examinations of one defendant, taken before the commissioners in a commission against the other defendant the bankrupt, cannot be read, unless proved in the cause that there were such examinations taken; for the proceedings in a com-

<sup>x</sup> Degolls and Ward, 3 P. W. 311. note.

<sup>z</sup> Utterfon and Mair, 4 Bro. 270. 2 Vez. J. 95.

<sup>y</sup> King and Martin, 2 Vez. J. 641.

mission against the one, are as to the other *res inter alios acta*<sup>a</sup>.

BOOK IV.  
CHAP. II.  
Sect. II.

Upon a bill by assignees to set aside a fraudulent conveyance made by bankrupt to defendant, the examinations of defendant's attorney, taken before the commissioners, not suffered to be read; not having been examined in chief in the cause<sup>b</sup>.

But the defendant having set up a different right in his answer, from that in his examinations before the commissioners, the court allowed the latter to be read, to shew the inconsistency<sup>c</sup>.

Assignees having brought a bill for discovery of concealments of bankrupt's property; motion for leave to defendants to look into their depositions before the commissioners, denied<sup>d</sup>.

SECT. III.

*Of assignees Proceeding, in suits &c. Commenced before the bankruptcy.*

Upon the subject of abatement by bankruptcy, there have been contrary determinations.

Ld. Hardwicke held it to be no abatement of a suit in equity, and therefore that an order for dissolving an injunction *nisi*, should be made absolute, notwithstanding the plaintiff was become bankrupt, unless he shewed cause<sup>e</sup>.

<sup>a</sup> Eade and Lingood, 1 Atk.

<sup>e</sup> S. C.

203.

<sup>d</sup> Boden and Dellow, 1 Atk.

<sup>b</sup> Hamond and Myers, 3 Atk.

289.

415.

<sup>c</sup> Anon, 1 Atk. 263.

BOOK IV.  
CHAP. II.  
SECT. III.

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On motion to dismiss a bill for want of prosecution, the plaintiff having become a bankrupt since the filing of the bill, Ld. Thurlow, after taking time to consider, held that the suit was absolutely abated, and that no order could be made for dismissing the bill for want of prosecution<sup>f</sup>.

This determination was considered and overruled in a subsequent case in the Exchequer; and it was said to be the clear established practice of that court, not to consider bankruptcy as an abatement, and that it was also the course to charge the bankrupt with costs according to the circumstances of the case<sup>g</sup>.

In the latest case upon this subject, where after a decree in a cause, referring it to a Master to take the accounts, and plaintiff, before the accounts were taken, took the benefit of an act of insolvents, and assignees were appointed, who conceiving the suit did not abate, took out warrants to proceed in the accounts before the Master; Ld. Loughborough, upon a motion to stay proceedings till a supplemental bill should be filed, held that there is no other way for the assignees to come into that court but by filing a bill. Though at law, assignees have been allowed to proceed in the bankrupt's name, giving security for the costs, yet at law the defendant can lose nothing, by the bankruptcy of the

<sup>f</sup> *Sellas and Dawson*, cited  
Co. B. L. 558.

<sup>g</sup> *Davison and Butler*, *ibid*.

plaintiff,



plaintiff, but his costs; and security for the costs, therefore, is all that is necessary. But in equity more is necessary: A plaintiff may be decreed to account and to pay the balance, and there must therefore be a substantive plaintiff, a party to the cause, who may abide such decree as may be made<sup>h</sup>.

Money being decreed to a plaintiff who became bankrupt, was ordered, on petition by him and the assignees, to be paid to the assignees, without a supplemental bill; the sum being too small to bear the expence<sup>i</sup>.

Petitioner becoming bankrupt, the assignees must prefer a new petition<sup>k</sup>.

With respect to proceedings after the death or removal of assignees; the new assignees cannot revive, there being no privity, or but an artificial one. But by a supplemental bill, they may have the benefit of the former proceedings; and though the party cannot come against the representatives of the former assignees for the costs, yet by the new assignees coming in upon the supplemental bill, he has the bankrupt's estate liable for the costs at all events<sup>l</sup>.

<sup>h</sup> Williams and Kinder, 3  
Vez. J. 387.

<sup>k</sup> Exp. Rattray, Co.B.L. 558.

<sup>l</sup> Anon, 1 Atk. 88.

<sup>i</sup> Setcole and Healy, 2 Bro.  
322.

## CHAP. III.

*Of Superfeding, and Renewing commissions.*

## SECT. I.

*Of Superfeding commissions.*

BOOK IV.  
CHAP. III.  
Sect. I.

THE only case in which any express provision by statute has been made, for superseding a commission, is that of the petitioning creditor compounding his debt with the bankrupt<sup>a</sup>: but the Ld. Chancellor has always exercised a discretionary power of this kind, whenever the ends of justice required, either for the sake of creditors, or of the bankrupt himself, that a commission should not be suffered to proceed.

A commission may be superseded upon a variety of grounds; and amongst others,

For want of a sufficient debt of the petitioning creditor<sup>b</sup>.

Or because the petitioning creditor was an infant, and therefore incapable of giving the bond to the Great Seal<sup>c</sup>.

Or for want of sufficient evidence of the trading; or of the act of bankruptcy<sup>d</sup>.

<sup>a</sup> 5 Geo. 2. c. 30. f. 24.

<sup>b</sup> Exp. Hylliard, 1 Atk. 147.  
Medlicott's ca. Stra. 899. Bur-

naby's ca. Stra. 653.

<sup>c</sup> Exp. Barrow, 3 Vez. J. 554.

<sup>d</sup> 1 Atk. 144.

Or

Or because the party was, in some other respect, not liable to the bankrupt laws; as being an infant <sup>e</sup>, or a feme covert <sup>f</sup>.

BOOK IV.  
CHAP. III.  
Sect. I.

Or in order to prevent a prosecution of the bankrupt, for the felony in not surrendering to his commission (154).

Or in cases of fraud; as where a commission issued, is not proceeded in for a length of time <sup>g</sup>: or where it plainly appears to have been taken out fraudulently and maliciously <sup>h</sup>. But a commission being taken out, to defeat an execution subsequent to the act of bankruptcy, is not for that reason alone fraudulent, if there is no collusion in the bankrupt <sup>i</sup>.

A second commission cannot be supported against a bankrupt who has not obtained his certificate under the first. All the property of an uncertificated bankrupt, whether what belonged to him at the time of the first commission, or what he has obtained since, belongs to his assignees under the first; the second commission has therefore nothing to operate upon, and all the proceedings, and the

<sup>e</sup> Exp. Sidebotham, 1 Atk. 346.

<sup>h</sup> 1 Atk. 218.

<sup>f</sup> Exp. Mear, 2 Bro. 266.

<sup>i</sup> Menham and Edmonson, Bos. and Pull. 369.

<sup>g</sup> Comb's ca. Sel. ca. Cha. 46.

Exp. Puleston, 2 P. W. 545.

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(154) See above, Book III. Chap. VI. Sect. VI.

certificate,



BOOK IV.  
CHAP. III.  
Sect. I.

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certificate, under it, are void <sup>k</sup>. But Ld. Hardwicke refused to supersede a second commission upon this ground; where it appeared the creditors under the first had signed the certificate, and acquiesced for a length of time, under the second <sup>l</sup>.

A commission may also be superseded by the agreement and consent of the creditors: and regularly, the actual consent of all the creditors ought to appear. But in a case, where the consent appeared of all except two, who could not be found, but the notes on which their debts arose, had been delivered up, with receipts upon them; a superseas was ordered, on the terms of procuring an affidavit to verify the signatures to the receipts <sup>m</sup>.

Although a majority of the creditors consent, the court will postpone it in order to give other creditors, an opportunity to prove their debts, who have not been able to come in sooner, and undertake to do it in a short time <sup>n</sup>.

And even though all the creditors consent, a superseas will sometimes be refused, for the sake of the bankrupt himself. As where a bankrupt, with the consent of his creditors, who had accepted a composition and released him by deed, applied

<sup>k</sup> Exp. Proudfoot, 1 Atk. 252.

Exp. Brown, 4 Bro. 210. S. C.

<sup>l</sup> Vez. J. 67.

<sup>l</sup> Exp. Proudfoot, 1 Atk. 252.

Dav. Bt. Law 440.

<sup>m</sup> Exp. King. 2 Vez. J. 40.

<sup>n</sup> Exp. Crispe, 1 Atk. 135.

to supersede the commission, and that he might be empowered to collect in some outstanding debts; the court directed that he should, on giving a proper indemnity to the assignees, stand in their place to get in the remainder of the debts, but would not supersede the commission, because the superedeas would entirely defeat his certificate<sup>o</sup>.

It has been refused to supersede a commission, merely on the ground of a misnomer in it of the bankrupt; as where a married woman was described in it as a widow<sup>p</sup>,

A general affidavit by the bankrupt that he is not one, is not a sufficient ground to supersede. He ought to give a particular answer to the facts charged in the depositions taken before the commissioners, and in the affidavits on the other side<sup>q</sup>.

In a doubtful case, the court will direct an issue to try the bankruptcy<sup>r</sup>; but not where the bankrupt has submitted to the commission for a length of time, and upon the examination, strong circumstances of bankruptcy have appeared<sup>s</sup>: as the party is still not left without remedy, but may bring his action (155).

Where

<sup>o</sup> Exp. Leaverland, 1 Atk. 145.

<sup>p</sup> Exp. Carington, 1 Atk. 206.

<sup>q</sup> Exp. Lingood, 1 Atk. 241.

<sup>r</sup> Exp. Willf. and Bradshaw,

1 Atk. 218.

<sup>s</sup> Exp. Nutt, ib. 102.

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(155) Mr. Cooke suggests (Co. B. L. 536, 7.) that where the application to supersede, is on the part of the creditors, it should seem the Chancellor would direct the bankruptcy to be tried

BOOK IV.  
CHAP. III.  
Sect. I.

Where the commission appears plainly to be taken out fraudulently or vexatiously, the court may supersede without directing an issue<sup>t</sup>.

In a doubtful case, and where the bankrupt is out of the kingdom, the court will not supersede the commission upon petition, but direct the bankruptcy to be tried in an issue<sup>u</sup>.

And sometimes, instead of either at once superseding, or directing an issue, the question has been referred back to the commissioners, for further enquiry and reconsideration<sup>x</sup>.

SECT. II.

*Of Renewing commissions.*

5 Geo. 2. c. 30. s. 44.

When it is necessary to renew a commission, by reason of the death of commissioners, or for any other cause, it shall be renewed; and but half of the fees usually paid upon granting commissions, shall be paid upon such renewal.

<sup>t</sup> 1 Atk. 218.

<sup>x</sup> S. C. ib. Exp. Lord, 2 Vez.

<sup>u</sup> Exp. Gulston, 1 Atk. 193.

26.

tried in an issue; because in an action at law by the bankrupt, the creditors would have no opportunity of contesting the validity of the commission, as the certificate would be sufficient evidence of the commission, &c.

The



The commissioners under the renewed commission, shall continue the proceedings from the stage at which the former ended <sup>r</sup>.

BOOK IV.  
CHAP. III.  
Sect. II.

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No commission shall abate by the death of the king.

72 Cha. ca. 193.

## CHAP. IV.

*Of Costs.*

## SECT. I.

*Of costs under the Commission.*


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1 *Ja. c. 15. s. 11.*

5 *Geo. 2. c. 30. s. 25. 33. 45.*

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BOOK IV.  
CHAP. IV.  
Sect. I.

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**T**HE costs and expences of the petitioning creditor, in suing forth and prosecuting the commission till assignees are chosen, are directed to be ascertained by the commissioners, at the meeting appointed for the choice of assignees; and the commissioners shall by writing under their hands, order the assignees to reimburse the petitioning creditor his costs and charges out of the first money or effects of the bankrupt, that shall be got in under the commission.

But if there appear to be reasonable objections to the allowances made by the commissioners, the Chancellor may, upon petition, refer the bill to a master in chancery to tax<sup>a</sup>.

<sup>a</sup> Exp. Vincent, Co. B. L. 8. Exp. Clarke, ib.

The solicitor's bill of costs subsequent to the choice of assignees, shall be settled by a master in chancery, and what he shall certify to be due, and no more, shall be paid by the assignees under the commission.

BOOK IV.  
CHAP. IV.  
SECT. I.

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The assignees, in making up their accounts, in order to make a dividend, are to be allowed all sums of money paid and expended in suing out and prosecuting the commission; and all other just allowances, on account of and by reason or means of their being assignees.

But if a solicitor carries on suits in equity for an assignee, without the authority of the major part in value of the creditors, present at a meeting, pursuant to notice in the gazette, for that purpose<sup>b</sup>, the estate of the bankrupt is not liable to his bill for such suits, but he must take his remedy against the assignee personally, who employed him<sup>c</sup>.

Witnesses sent for by the commissioners, shall have such costs and charges as the commissioners in their discretion shall think fit. And the costs ordered by them, may be recovered in assumpsit against the assignees; and it is not necessary that the order should be in writing<sup>d</sup>.

<sup>b</sup> 5 Geo. 2. c. 30. s. 38.

<sup>d</sup> Yarker and Botham, Esp.

<sup>c</sup> Exp. Whitchurch, 1 Atk.

N. P. 64.



*In Suits and Other proceedings.*  

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5 Geo. 2. c. 30. s. 7. 41.

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The plaintiff, in an action on which the defendant paid money into court, proceeded and recovered a larger sum, and then became bankrupt; the court would not order the money to be paid out of court to the assignees, without first paying out of it the attorney's bill of costs<sup>e</sup>.

Though the statute gives a bankrupt who has obtained his certificate, his full costs, upon a recovery at law, in any suit against him for a debt due before the bankruptcy, yet this will not entitle him, more than other persons, to costs against executors or administrators<sup>f</sup>.

Where a commission is superseded, only for a defect in form, the costs of the supersedeas only shall be allowed: otherwise, if upon the merits<sup>g</sup>.

On a supersedeas, after a trial at law in which the party was found no bankrupt, the costs of the supersedeas, and also of the different proceedings both in equity and at law, were ordered to be paid

<sup>e</sup> Oulton and O'Bryan, Barnes  
245.

<sup>f</sup> Martin and Norfolk, 1 H.  
Bl. 528.

<sup>g</sup> Exp. Goodwin, 1 Atk. 200.

to the bankrupt by the petitioning creditor: this being considered as quite a different case from a common suit in equity by bill, where it begins first in that court, and is a single proceeding only; but taking out a commission is a proceeding at law in the first instance, and all that is done afterwards is consequential, and costs being given at law, they follow of course in the proceedings in equity<sup>b</sup>.

In a fraudulent case, where a commission was not proceeded in within six months after it was taken out, the court said they would take care the expence of a superseedeas should not come out of the bankrupt's estate<sup>c</sup>.

In a case of gross fraud in procuring a commission of bankrupt, the court ordered costs as between attorney and client, against all the parties except those who had made discovery; deprived the attorney of his office of master extraordinary, and committed him and his clerk<sup>d</sup>.

There is no instance of costs against an uncertificated bankrupt, on dismissing petition to put a creditor to his election<sup>e</sup>.

But if he is proceeding vexatiously; as where he presents a third petition, for the same purpose as two others before dismissed; though the court will not restrain him from presenting any more, he may lose his privilege, like the case of a pauper

<sup>b</sup> Exp. Gullston, 1 Atk. 139.<sup>c</sup> Exp. Thorp, 1 Vez. J. 394.<sup>d</sup> Exp. Puleston, 2 P.W. 545.<sup>e</sup> Exp. Wright, 2 Vez. J. 9.

BOOK IV.  
CHAP. IV.  
Sect. II.

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dispaupered for misconduct, and pay costs personally, and if not able to pay, he must be committed<sup>m</sup>.

And costs have been given against an uncertificated bankrupt in a case of fraud and misconduct<sup>n</sup>.

In an action against a bankrupt who has obtained his certificate, if the plaintiff prove it to have been fraudulently obtained, the statute gives costs to the plaintiff.

No costs are given to a party, upon a petition appealing from the determination of the commissioners, though their determination were wrong, and the court thought it necessary to direct an issue or a trial at law<sup>o</sup>.

An order cannot be reheard for costs<sup>p</sup>.

<sup>m</sup> Exp. Shaw, 2 Vez. J. 40.

<sup>o</sup> Exp. Allen, Co. B. L. 2.

<sup>n</sup> Lock and Bromley, 3 Vez.

<sup>p</sup> Exp. Slack, *ibid*.

J. 40.



## BOOK THE FIFTH.

## OF COMMISSIONS AGAINST PARTNERS.

## CHAP. I.

*Of Taking out the commission, Opening, &c.*

## SECT. I.

*Against whom a Joint or Separate commission may  
be taken out respectively.*

**P**ARTNERS are liable either to a joint commission against them all, or to separate commissions against each individually: and it was formerly the practice to take out both a joint commission against all, and separate commissions against each, at the same time. This arose probably from the difficulty which commissioners found, where only a single commission was taken out, to marshal the joint and separate estates between the respective classes of creditors, the statute having given no directions for that purpose; but the practice of taking out joint and separate commissions together, being found to be attended with a double expence, and to occasion confusion with respect to the effects (156), was afterwards

BOOK V.  
CHAP. I.  
Sect. I.

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(156) This may be imagined from (amongst other things) the necessity which it appears there was for frequent applications

BOOK V.  
CHAP. I.  
Sect. I.

afterwards discountenanced<sup>a</sup>, and the respective classes of creditors have been, by degrees, though with some variation in this respect, and under certain restrictions, admitted to come in under one and the same commission. And it seems now to be settled, upon the same principles which appear to have been laid down, in cases determined even before the practice in question was discontinued<sup>b</sup>, that a joint and separate commission cannot subsist together in point of law; because all the effects of the bankrupt, present and future, vesting in his assignees under the first commission, there is nothing to pass under a second, or upon which that can operate, until he has obtained his certificate under the first<sup>c</sup>.

Considering a commission in the nature of an action, it is held that a joint commission must include all the partners, and that there cannot be a commission against two or more, of a partnership consisting of a greater number<sup>d</sup>.

So if one of three partners is an infant, so that there cannot be a commission against the three;

<sup>a</sup> Howard and Poole, Dav. Exp. Proudfoot, 1 Atk. 252.  
431. In re Simpfons, 1 Atk. <sup>c</sup> Exp. Brown, 2 Vez. J. 67.  
338. <sup>d</sup> Allen and Hartley, Co. B.  
<sup>b</sup> Exp. Cook, 2 P. W. 499. L. 5.

to the court to order the assignees under the joint commission to deliver up specific parts of the separate estate which they had seized, to the assignees under the separate. See Exp. Vaughan, cited 3 P. W. 407. Exp. Hunter, 1 Atk. 228.

neither can a joint commission against the other two be supported<sup>e</sup>.

BOOK V.  
CHAP. I.  
SECT. II.

SECT. II.

*Of the Act of bankruptcy.*

And under a joint commission, each of the partners must severally be proved to have committed an act of bankruptcy, for the commission cannot be void as to some, and valid as to others<sup>f</sup>.

A conveyance by partners of all the partnership effects in trust for the benefit of all their creditors who should execute the deed, is an act of bankruptcy, if any one even of their separate creditors do not assent: for they are all, the separate as well as the joint creditors, interested in the fund; the joint in the first instance, but the separate also in the event of a surplus after the joint are paid<sup>g</sup>.

SECT. III.

*Of the Petitioning creditor's debt.*

A debt due from a partnership will support a separate commission against one partner. This has been long settled, and upon these grounds: that a partnership debt is the debt of each partner, as well as of him and his partners, and a certificate under a separate commission discharges him of

<sup>e</sup> Exp. Henderson, 4 Vez. J.

<sup>g</sup> Eckhardt and Wilson, 8 T.

163.

R. 140.

<sup>f</sup> Beasley and Beasley, 1 Atk. 77.

Allan and Hartley, Co. B. L. 5.



BOOK V.  
CHAP. I.  
Sect. III.

joint as well as separate debts, which could not be unless each partner, in construction of law, was debtor for the whole; that though at law a joint action must be brought for a joint debt, yet the creditor may take execution and levy the whole debt against any one of them, and a commission is to be considered rather as an execution than as an action; and lastly, that it would be a great inconvenience and prejudice to trade, if where the credit was joint, yet from any cause, as from the infancy of one of the partners, or from one not having committed an act of bankruptcy, a joint commission could not be had, creditors should therefore be prevented from taking out a separate commission against the other<sup>h</sup> (157).

SECT. IV.

*Effect of the party's Death.*

A joint commission does not abate by the death of one of the partners, after they have been found bankrupt; but if one is dead at the time of taking it out, it abates and is absolutely void<sup>i</sup>.

<sup>h</sup> Crispe and Peritt, Dav. Br. Law. 462. Exp. Crispe, 1 Atk.

<sup>i</sup> Beasly and Beasly, 1 Atk. 97. And see above, p. 80.

(157) These reasons might, perhaps, equally apply to shew that joint creditors might also prove and take dividends from the separate estate, but it has been found convenient to make a different distribution; and see below (p. 465.), the distinction which has been made betwixt the case of the petitioning creditor, and other joint creditors, in this respect.

## CHAP. II.

*Effect of the assignment.*

UNDER a joint commission, the assignees take all the joint property; and all the separate property of each individual partner<sup>k</sup>. Under a separate commission, they take all the separate property of the bankrupt and all his interest in the joint property<sup>l</sup>.

BOOK V.  
CHAP. II.

The extent of this interest is exactly the same as that which vests in a separate creditor of one partner, by judgment at law, taking execution against the partnership effects.

The interest of the solvent partner is not affected by the execution in the one case<sup>m</sup>, nor by the bankruptcy in the other<sup>n</sup>. In the former case, the sheriff, though he may seize the whole, can sell only an undivided moiety, and the vendee becomes tenant in common with the solvent partner, taking only the *undivided* share of his debtor, subject to all the rights of the other, and to the account to be taken between them as partners.

<sup>k</sup> Exp. Cook, 2 P. W. 499.  
Exp. Baudier, 1 Atk. 98. Exp.  
Turner, cited Burr. 2176. Bol-  
ton and Puller, Bos. and Pull.  
547.

<sup>l</sup> Exp. Cobham, 1 Br. 576.  
Exp. Hodgson, 2 Br. 5. Bolton

and Puller, Bos. and Pull. 547.

<sup>m</sup> Heydon and Heydon, Salk.  
392. Bachurst and Clinkard, 1  
Sho. 173. Jacky and Butler, 2  
Ld. Raym. 871.

<sup>n</sup> Anon, 3 Salk. 61. Anon.  
12 Mod. 446.

BOOK V.  
CHAP. II.

In taking the account between partners, the whole of the partnership property is to be applied in the first place to the debts of the partnership; and no one partner is separately entitled to any thing in the joint property, but his proportion of the clear residue or *surplus* remaining *after* payment of the partnership debts. In ascertaining this proportion, each is to be allowed against the other, every thing he has advanced or brought into the partnership, and is entitled to charge the other with what that other has not brought in, or has taken out more than he ought; and nothing else is to be considered as his *share* or *interest* in the *joint property*, but such proportion of the residue, on balance of the account, after the partnership debts paid.

So in the latter case, that of bankruptcy, the assignees under a separate commission against one partner, can affect the joint property no farther than the bankrupt himself; they have no right to change the possession, or to make any specific division of the effects; they take only such *undivided* share or interest as the bankrupt partner himself had, and in the same manner as he had it; that is, subject to all the rights and liens of the other, as a partner, and entitled only to the balance of the account, after the partnership debts paid<sup>o</sup>.

<sup>o</sup> See Richardson and Goodwin, 2 Vern. 293. West and Skip, 1 Vez. 242. Fox and Han-

bury, Cowp. 445. Eddie and Davidson, Dougl. 627. Field and ———, 4 Vez. J. 396.

In



In like manner as in common cases of bankruptcy, the assignees of a partner bankrupt, stand in the place of the bankrupt, and are bound by all acts fairly done by him in relation to his property before he became a bankrupt. If a bankrupt therefore, being engaged in one trade, enter into partnership with another in a different trade, and they become mutually partners in both, and upon a dissolution, the bankrupt, before his bankruptcy, release to his partner all demands, and take upon him the payment of the debts of the one trade, and the other the payment of those of the other, and the respective debts are transferred accordingly, the assignees of the bankrupt cannot take the effects of the released partner <sup>P</sup>.

By the bankruptcy of one partner, the partnership is dissolved, at least as to all acts done by him subsequent, which are avoided by the relation of the statutes from the time of the act of bankruptcy; and all his interest is, by the same relation, vested in his assignees who cannot carry on a trade. And this avoidance is an entire, not a partial avoidance, of all his acts, as well in respect of his partners moiety, as his own <sup>Q</sup>. But as each, while solvent, has a power singly to dispose of the whole of the partnership effects, a secret act of bankruptcy by one unknown to the other, will not avoid a *bonâ fide* sale of them made by the latter, and the

<sup>P</sup> Ex. Titner, 1 Atk. 136. <sup>Q</sup> Hague and Rolleston, Burr. 2174.

vendee will be entitled to retain them against the assignees<sup>r</sup>.

Where one of three partners in an adventure advanced only a part of his third of the expence, and after giving his notes for the remainder, and before they fell due, became bankrupt; it was held that his assignees were entitled to his *full* third of the profits, upon paying such *dividend* upon his notes as his estate afforded to his other creditors under the commission: upon the 'grounds, that as all the expence of the adventure was incurred before the bankruptcy, and if it had turned out a losing one, he would have been liable for the whole in proportion with the others, he had therefore clearly a right to his third of the *profits* at the time of the bankruptcy; and that his subsequent insolvency did not vary his right' (158).

CHAP.

<sup>r</sup> Fox and Hanbury, Cowp.  
445.

<sup>s</sup> Smith and De Silva, Cowp.  
469.

(158) This case seems to be contrary to all the other cases, with respect to the manner of taking partnership accounts. It is plain there can be no account of *profits*, or division of the produce of the adventure, till after all the *expences* paid; and the share of each depends upon the account to be taken, in which each is entitled mutually to be allowed, and to charge what has been advanced or brought in or not brought in, or taken out, more than his share, by the one or the other respectively. The assignees could have no better right than the bankrupt himself, who, if there had been no bankruptcy must either have paid up his full third of the expence, or the deficiency must

## CHAP. III.

*Of the Proof of debts.*

**A**S the certificate discharges the bankrupt from all his debts joint as well as separate, whether it is obtained under a separate or a joint commission; so creditors of either description have always been allowed to prove their debts, under commissions of either kind, for the purpose of *assenting or dissenting to the certificate*. But the right of proving for the purpose of *receiving a satisfaction* from the joint or the separate property, under the one or the other commission, respectively, turns upon a very different principle, and is a question which has lately given rise to considerable discussion and variety of determination.

BOOK V.  
CHAP. III.

## SECT. I.

*Of Separate debts.*

At law, the separate creditor of a partner may take either the separate property of his debtor, or his debtor's share in the joint property, or both, if

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must have been deducted from his share of the profits; but according to the principle laid down in the case above cited, the assignees were placed in a much better situation than the bankrupt himself would have been if he had continued solvent; they would receive more even than any of the solvent partners, and would have the singular advantage of gaining more in proportion as they contributed less!

necessary :



BOOK V.  
CHAP. III.  
— Sect. I.

necessary : and a creditor of the partnership may take the whole joint property, or the whole separate property of any one partner.

But under a commission, which has been compared sometimes to an action and sometimes to an execution, though the analogy, in either respect, perhaps fails in more instances than it applies, the property seised, whether joint or separate, is no longer disposed of as at law ; but falling immediately under the administration of the court of Chancery, the effects are subjected to a mode of distribution amongst the different classes of the creditors, founded as well upon the equity of that court, as upon the general intention of the statutes, that all creditors should have an equal satisfaction<sup>t</sup>. It has accordingly been long established<sup>u</sup> as a rule of that court that where there are different sets of creditors, each estate shall be applied exclusively in the first instance to the payment of its own creditors, the joint estate to the joint creditors and the separate to the separate ; and that neither the joint creditors shall come upon the separate estate, nor the separate upon the joint, but only upon the *sur-*

<sup>t</sup> 1 Atk. 100. 3 P. W. 408.

<sup>u</sup> Craven and Knight, 2 Ch. Rep. 226. Exp. Crowder, 2 Vern. 706. Exp. Cook, 2 P. W. 499. Mackenfon and Parker, cited Barn. B. R. 470. Horsey's ca. 3 P. W. 23. Goss and Dufresnay, 2 Eq. Abr. 110. S. C. Dav. 371. Exp. Rowlandson, 3 P. W. 405. Twiss and Mas-

sey, 1 Atk. 67. Exp. Abingdon, cited 1 Atk. 98. Exp. Bankes, ib. 106. Exp. Hunter, ib. 223. Exp. Baudier, ib. 98. Exp. Powells, 2 Eq. Abr. 111. S. C. Dav. 373. Exp. Bond and Hill, 1 Atk. 98. Exp. Hayward, Co. B. L. 251. Exp. Burnaby, ib. 253. Exp. Elton, 3 Vez. J. 238.

*plus*

*plus* of each that shall remain after each has fully satisfied its own creditors respectively.

BOOK V.  
CHAP. III.  
Sect. I.

In conformity to this rule of distribution, separate creditors have never been permitted to come in directly upon the joint estate, along with the joint creditors<sup>x</sup>: but as the assignment under a joint commission is of the whole estate, as well of the separate estate of each partner, as of the joint estate of all the partners; separate creditors have always been allowed (formerly by special order, the commissioners having no original authority for the purpose; but latterly by a general order<sup>y</sup>, to save the expence and delay of applications in each particular case), to prove under a joint commission, for the purpose of receiving dividends from the separate estate in the first instance, and afterwards from the surplus, if any, of the joint estate, after the joint creditors are satisfied<sup>z</sup> (159).

<sup>x</sup> Same cases.

Horsey's ca. 3 P. W. 23. Exp.

<sup>y</sup> See Ld. Loughborough's order, 8th March 1794.

Baudier, 1 Atk. 98. Exp. Powells, 2 Eq. Abr. 111.

<sup>z</sup> Exp. Crowder, 2 Vern. 706.

(159) As, under a joint commission, the assignees are chosen only by the joint creditors, it might, perhaps, be for the benefit of the separate estates if some provision could be made for the choice of one or more of the assignees from among the separate creditors. Joint creditors are apt sometimes to neglect the separate estates, unless quickened by the prospect of a surplus, and even a surplus may sometimes be found too soon. The separate creditors were in a better situation, in these respects, when separate commissions were allowed to be taken out at the same time with a joint one.

Where

BOOK V.  
CHAP. III.  
Sect. I.

Where the credit has been joint, though a separate security only was taken, such a creditor will be admitted directly upon the joint estate <sup>a</sup>.

So where creditors lent money to two partners upon their joint notes, and upon the separate bonds of each; and the money was applied to the use of a partnership consisting of them and others, who all agreed to consolidate the separate debts, and to consider them as the debts of the new partnership; they were allowed to be proved upon the joint estate of the whole <sup>b</sup>.

But a separate creditor by bond, of one who afterwards took in a nominal partner, and became bankrupt, was not allowed to prove under the joint commission (160); there being no evidence of its having been made a joint debt. But it was said that if interest had been paid by both, that would have been considered as an adoption of the debt, and would have made the partnership liable <sup>c</sup>.

A broker, insuring with an underwriter, who underwrote separately, but had partners, and the broker kept the account as with the partnership, must prove upon the separate estate; insurance with a partnership being prohibited by the statute <sup>d</sup>.

<sup>a</sup> Exp. G. Brown, cited in Exp. Hunter, 1 Atk. 225. and see *ibid.* 227.

<sup>b</sup> Exp. Clowes, 2 Bro. 595.

<sup>c</sup> Exp. Jackson, 1 Vez. J. 131.

<sup>d</sup> Exp. Angersstein, 1 Bro. 399. Exp. Lee, *ibid.* See 6 Geo. 1. c. 18, and Mitchell and Cockburn, 2. H. Bla. 379.

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(160) There was no separate estate.

Money



Money *borrowed* by one partner for his private use, though applied to pay partnership debts, cannot be proved by the lender, upon the joint estate<sup>e</sup>. Nor trust money in the hands of one partner, applied by him to the use of the partnership, but without the privity of his copartners; for one abusing his trust and advancing money to the partnership, raises no contract between the partnership and the person whose money it is<sup>f</sup>. But if it is advanced with the privity of his partners, it becomes a debt against the partnership; and though after the money was advanced, the partners separate, and the partnership effects are assigned to one of them, who takes upon him all the debts, that is no payment in discharge of the other, but both remain liable<sup>g</sup> (161).

SECT. II.

*Of Joint debts.*

As it frequently happened that joint property was taken under a separate commission, so joint creditors were frequently allowed to come in under it for a satisfaction of their debts; but it was always subject to the same direction as in the case

<sup>e</sup> Exp. Wheatly, Co. B. L.

<sup>g</sup> Smith and Jamefon, 5. T.

550.

R. 601.

<sup>f</sup> Exp. Apfey, 3 Bro. 265.

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(161) In this case it appeared the money in question was entered in the books on the *joint account*.

of

BOOK V.  
CHAP. III.  
Sect. II.

of a joint commission, that the different estates should be applied to the payment of their respective creditors <sup>h</sup>.

And I believe there is no instance of joint creditors being allowed to come in, *pari passu* with separate creditors, upon the *separate* estate, till the rule was broke in upon by a great authority in some very late cases; in which it is said to have been held, that as the assignees under a separate commission might possess themselves not only of the separate estate, but of the bankrupt's proportion of the joint estate; and as a separate commission might be taken out by a joint creditor; and separate creditors were allowed to come in under a joint commission (162); there was therefore no distinction to be made between joint or separate debts, but that they ought all to be paid *pari passu*, out of the bankrupt's property, which was composed of his separate estate and of his moiety of the joint estate <sup>i</sup>.

<sup>h</sup> Mackenfon and Parker, cited 1 Barnard, B. R. 470. Exp. Baudier, 1 Atk. 98. Exp. Voguel, ib. 132. Exp. Hayward, Co. B. L. 251. Exp. Barnaby, ibid. 253. Exp. Oldknow, ib. 238. And see the cases upon bill filed to the same effect, Craven and Knight, 2

Ch. Rep. 226. Richardson and Goodwin, 2 Vern. 293. Goss and Dufresnay, 2 Eq. Abr. 110.

<sup>i</sup> Exp. Cobham, 1 Bro. 576. Exp. Hodgson, 2 Bro. 5. Exp. Page, ib. 119. Exp. Flintum, ib. 120.

(162) But it does not appear, in any older case where separate creditors were allowed to come in under a joint *commission*, that this was for the purpose of coming in directly upon the *joint estate* along with the joint creditors.

At

At the same time this right of the joint creditors to come upon the separate estate is said not to have been laid down so generally, as would appear from the imperfect reports which we have of these cases, but that it was understood to be subject to this limitation, that if the assignees of the separate estate would undertake to file a bill against the other partners, the creditor admitted to prove was to be restrained from receiving a dividend<sup>k</sup>. But the question has been again considered at great length, in a subsequent case<sup>l</sup> upon the petition of joint creditors claiming to prove under a separate commission, for the purpose of receiving a dividend from the separate estate. In this case, in which there was a joint fund in the hands of solvent partners, it was held, that the rule for applying each estate respectively to the payment of its own debts was too long established to be altered: that the case of a joint creditor suing out a separate commission, was very different from that of other joint creditors; and that the former was allowed to come in upon the separate estate along with the separate creditors, upon the equitable ground, that by taking out the commission he was precluded from suing at law, and having done so for the benefit of the separate creditors they could not object to his having the benefit of it for his own debt; but that other joint creditors were exactly in the

<sup>k</sup> See Exp. Elton, 3 Vez. J. 15. C.  
238.



BOOK V.  
CHAP. III.  
Sect. II.

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case of a person, having two funds, whom a court of equity would not allow to attach himself upon one fund to the prejudice of those who had no other: that the separate creditors having no right to claim against the solvent partners but what the bankrupt's separate estate should have paid *beyond* his *moiety* of the partnership debt, a joint creditor, proving his whole debt against the separate estate in the first instance, could not put the assignees of that estate, in his situation, as to the joint fund; for each partner being, as between themselves, liable for a moiety, and for a moiety only, of the partnership debts, the assignees of the separate estate, would only claim in the same right as the bankrupt, against the solvent partners, namely, what was paid *beyond* his *moiety*, though his estate had been charged with a proof for the entire debt, and paid a dividend upon that amount; whereas if the joint creditor had recourse to the solvent partner and recovered of him in the first instance, the separate estate would have the like benefit in the latter case, as the solvent partner in the former: that it would be unjust therefore to compel the assignees of the separate creditors, who as such have no right against the partnership fund, to file a bill against the other partners to assert the right of the joint creditor making the claim, to go against the joint estate, who has himself an easier and quicker remedy by suing the partnership: and the petitioners were admitted to prove, but the dividend was ordered to be reserved

reserved until it should be seen what they had or might have received from the partnership effects.

BOOK V.  
CHAP. III.  
Sect. II.

As creditors having only a separate security are yet admitted upon the joint estate, if the credit was really joint; so a creditor, with a security in a joint form, will be admitted upon the separate estate, where it appears to have been intended there should be a several liability<sup>m</sup>.

SECT. III.

*Of Joint and Several debts.*

A joint and several creditor cannot come upon both estates at the same time. He must make his election, and which ever he chuses, he will not be allowed to come upon the other unless there is a surplus after paying its own debts<sup>n</sup>. But he must have time to look into the accounts of the respective estates that he may see which will be the most beneficial to him<sup>o</sup>; and has been allowed to defer his election till a dividend declared<sup>p</sup>. Even the receiving of a dividend is no determination of his election, and he has been allowed to change, upon refunding the dividend<sup>q</sup>.

<sup>m</sup> In re Bate and Henckell,  
3 Vez. J. 400. In re Freeman  
and Grace, ib. 401.

<sup>n</sup> Exp. Rowlandson, 3 P. W.  
405. Exp. Bankes, 1 Atk. 106.

Exp. Bond and Hill, ib. 98.

<sup>o</sup> Same cases.

<sup>p</sup> Exp. Clowes, Co. B. L.  
258.

<sup>q</sup> Exp. Rowlandson, 3 P. W.

## SECT. IV.

*Of Proofs by Partners, or in right  
of Partners.*

It has been held, where one partner borrowed a sum of money upon his own security, which he afterwards lent to the partnership, that the principal creditor, though he could not come in upon the joint estate directly in his own right, there being no evidence of any contract as between him and the partnership, might do so by a circuitry, as standing in the place of the partner, who had advanced the money to the partnership, and had thereby become a creditor upon the partnership fund<sup>r</sup>. But it appears not to have been attended to in this instance, that the claim of such partner himself upon the joint property, is only for his proportion of the *surplus*, upon the balance of accounts, after the joint property has been in the first place wholly applied to satisfy the joint creditors; and upon this ground it seems by subsequent determinations to be settled that a partner cannot be a creditor upon the partnership fund in competition with joint creditors<sup>s</sup>.

But if one or more of the members of a partnership carry on a distinct trade, and become in such

<sup>r</sup> Exp. Hunter, 1 Atk. 223.

J. 167. Exp. Burrell, ib. Co.

<sup>s</sup> Exp. Parker, cited 1 Vez.

B. L. 544.



separate capacity, creditors of that partnership which becomes bankrupt, a proof may be made on their behalf, as if they had dealt with strangers<sup>1</sup>.

BOOK V.  
CHAP. III.  
Sect. IV.

As a separate creditor of one partner cannot by standing in his place be a creditor upon the partnership found in competition with joint creditors, *so* a joint creditor cannot by standing in the place of the partnership, become a creditor, in competition with the separate creditors, upon the separate estate of one of the partners, who is indebted to the partnership fund by taking out more than his share<sup>2</sup>: *unless* it has been taken with a fraudulent intent to increase his separate estate<sup>3</sup>. The joint assignees have been denied leave to prove against the separate estate of one of the partners, the balance of a long account due from him to the partnership<sup>4</sup>.

There seems to be no doubt that in their individual capacities, one partner may be a creditor of another, and continuing solvent may prove, or if he becomes bankrupt that his assignees may prove, the debt, under a separate commission against the other. But it has been ingeniously suggested by Mr. Cooke<sup>5</sup>, that if the debt arises by paying more than his moiety of the partnership debts, it

<sup>1</sup> Exp. Ring, Co. B. L. 551.

<sup>2</sup> Exp. Batson, Co. B. L. 547. Exp. Drake cont. cited 1 Atk. 225. which seems S. C. as Exp. Blake, Co. B. L. 545.

<sup>3</sup> Exp. Batson, Co. B. L.

547. Exp. assignees of Lodge and Fendall, 1 Vez. J. 166. Exp. Cust in re Forryce, Co. B. L. 548.

<sup>4</sup> E p. Grill, Co. B. L. 547.

<sup>5</sup> Co. B. L. 550.

could not be proved unless the payment was prior to the bankruptcy of the other (163).

## SECT. V.

*Of the assignees Accounts of the respective estates.*

Under a joint commission, distinct accounts of the respective estates, and the application of them to their respective creditors according to the rule of distribution mentioned in the first section of this chapter, are directed by the general order for admitting separate creditors to prove their debts<sup>a</sup>. And under a separate commission where joint property has been taken, the accounts have been directed in the same manner, upon petition<sup>b</sup>; but it has since been held that this cannot be done upon petition, without consent of the solvent partner who has an interest in the distribution<sup>c</sup> of the joint fund, and to controvert the demands upon it, but must be upon a bill filed<sup>c</sup>.

<sup>a</sup> Lord Loughborough's Order, 8th March 1794.

<sup>b</sup> Exp. Hayward, Co. B L. 251. Exp. Burnaby, ib. 253.

<sup>c</sup> Exp. Lydiard, C. B. L. 254. Hankey and Garratt, 3 Bro. 458.

(163) It is like the debt of a surety, and partners may be considered as reciprocally sureties for each other to the joint creditor; but as between themselves no debt arises till actual payment beyond the moiety. If the joint creditor were admitted to prove against the one, quære, whether the other, by paying beyond his moiety, might not, like a surety, have the benefit of the joint creditor's proof, though such payment were subsequent to the bankruptcy.

Under

Under a joint commission against three, of whom one had first traded separately and had creditors, and afterwards took in another as a partner, who both became partners with the third; distinct accounts were directed, and that each estate should bear first its own debts <sup>d</sup>.

Under a joint commission against two, where property was taken, belonging to the bankrupts jointly, to each separately, and to one of them jointly with another person; the only order, which it was thought could be made, was for keeping distinct accounts of the joint and separate estates of the bankrupts, and that the creditors of the one of them jointly with the other person, might come in as separate creditors under that order <sup>e</sup>.

SECT. VI.

*Of Set-off.*

The debtor of a partnership cannot against the partnership debt set off a debt due to him from one of the partners, because the debts are between different persons, and in distinct rights; and the debts from the partnership must be first paid before any part of the fund can be applied to the separate debts of the respective partners. But if there is a surplus, then out of the partner's share

<sup>d</sup> Exp. Marlin, 2 Bro. 15.

<sup>e</sup> Exp. Parker, Co. B. L.  
256.



BOOK V.  
CHAP. III.  
Sect. VI.

of that surplus, the debtor of the partnership may deduct the partner's separate debt to himself<sup>f</sup>.

A surviving partner may set off a debt due to him jointly with the deceased partner, against a separate demand upon him in his own right: the right of action for such debt surviving to him alone<sup>g</sup>.

#### SECT. VII.

##### *Creditor proceeding at Law.*

A creditor by bond of two obligors, having after the bankruptcy of the one, taken the body of the other in execution, and after receiving a part of his debt discharged him, was allowed to come in as a creditor under the other's commission, it being held that the interest vested in the creditors by the assignment under the commission, which was compared to a *fi. fa.* executed, was not divested by a subsequent *ca. sa.* against the other<sup>h</sup> (164).

<sup>f</sup> Lanesborough and Jones, 1 P. W. 326. the note of the reporter. Exp. Quintin, 3 Vez. J. 248.

<sup>g</sup> Slipper and Stidstone, 5 T. R. 493.  
<sup>h</sup> Exp. Smith, 1 P. W. 237.

(164) He was allowed to prove only for a *moiety* of the *residue* of the debt, each being liable in equity; it was said, only for half the debt; but that if the bankrupt had actually received the whole money, the creditor might have proved the whole. A different rule has been since laid down, with respect to the amount of proof in such cases; for which see above, p. 96. 103.

On

On the other hand a creditor coming in and receiving dividends under a commission against one partner, is not thereby precluded from proceeding against the other, who is on the contrary benefited by the lessening of his debt in proportion to the amount of the dividend paid <sup>1</sup>.

<sup>1</sup> Heath and Percival, Stra. 403. S. C. 1 P. W. 682.

## CHAP. IV.

*Of the Certificate, and the bankrupt's Allowance.*

## SECT. I.

*Of the Certificate.*


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10 *Ann. c. 15. s. 3.*

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BOOK V.  
CHAP. IV.  
Sect. I.

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ALL debts, whether joint or separate, are equally discharged by the certificate, under either a separate or a joint commission<sup>b</sup>. The statutes say nothing about joint or separate debts, or joint or separate commissions, but discharge the bankrupt, generally, from *all debts* due or owing by *him* before he became a bankrupt; and a joint debt is the debt of *each partner* as well as the debt of all the partners jointly<sup>i</sup>.

But it is provided by the statute of Anne that the certificate obtained by one partner or joint debtor shall not discharge or release the other who

<sup>b</sup> Exp. Yale, 3 P. W. 24.  
Grace and Higham Fitzg. 281.  
Exp. Caruthers, Dav. 468.  
Howard and Poole, Stra. 995.  
Twiss and Massey, 1 Atk. 67.

Wickes and Strahan, Stra. 1157.

<sup>i</sup> Howard and Poole, Dav. 431. Exp. Caruthers, ib. 468.  
Exp. Yale, 3 P. W. 24.

shall



shall be liable to the debt as if the bankrupt had never been discharged (165).

BOOK V.  
CHAP. IV.  
Sect. II.

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## SECT. II.

*Of the bankrupt's Allowance.*

Under a joint commission, partners cannot have a double allowance, one in respect of the joint, and the other of the separate estate; and one allowance only is to be divided between them in respect of their joint and separate estates, according to the proportion which the surplusses of their respective separate estates, and the respective moieties of their joint estates have contributed to the payment of the joint debts <sup>k</sup>.

<sup>k</sup> Exp. Bate, 1 Bro. 452.

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(165) Partners, though each is liable for the whole of a joint debt to the joint creditor, are, as between themselves, liable only in moieties; and one paying only his moiety can have no demand against the other. *Quære*, If one paying more than his moiety, *after* the other has obtained his certificate, can charge the latter with such over payment; for it seems a payment without consideration as to him; such payment, which alone could create a debt from him to his partner, being made when he was no longer liable for any part of the debt to the joint creditor?

## CHAP. V.

*Of Actions by and against Assignees.*

BOOK V.  
CHAP. V.

THE same persons assignees under two separate commissions against two bankrupts partners, may join in action to recover money due to the two jointly ; but cannot in the same action recover also separate debts due to each. They cannot in the same action sue in different rights<sup>1</sup>.

A declaration by persons being assignees of A. and B. and also of C. for a joint debt due to A, B, and C. was held good, on motion in arrest of judgment, after verdict<sup>m</sup>. Assignees must make out their title by shewing that those under whose commissions they claim, would have been entitled to recover in the same name : but nothing in this record shewed that they might not claim under a joint commission, or under separate commissions against each. Presumed, after verdict, that they must at the trial have proved themselves legally constituted assignees. For any thing that appeared, one commission might be sued on the debt of A. and B. and another on a separate debt of C. and then the assignees under both might join in action for a debt due to both estates.

A cause of action accruing to a partnership, by reason of money paid, in a partnership transaction,

<sup>1</sup> Hancock and Haywood, 3  
T. R. 433.

<sup>m</sup> Streatfield and Halliday,  
ib. 782.

by one of the partners after the bankruptcy of another; the solvent partner cannot sue alone, but must join with the assignees of the other<sup>n</sup>.

BOOK V.  
CHAP. V.

To an action of *assumpsit* brought by partners, the defendant may plead the bankruptcy, and assignment of the effects of one of them: and this was distinguished from the cases in which a bankrupt has been allowed to bring *trover*<sup>o</sup>, but this being upon *contract*, which is transferred to his assignees<sup>p</sup>.

A secret act of bankruptcy by one partner unknown to the other does not avoid the acts of the other, done afterwards *bona fide*, in relation to the partnership property; either in respect of the bankrupt's moiety or his own. But even if such acts of the solvent partner bound only his own, and not the bankrupt's moiety, the assignees being tenants in common, cannot have *trover* against the solvent partner's vendee<sup>q</sup>.

<sup>n</sup> Graham and Robertson, 2 T. R. 282.

<sup>o</sup> See Fowler and Down, Webb and Fox, &c.

<sup>p</sup> Eckhardt and Wilson, 3 T. R. 140. See above, p. 414.

<sup>q</sup> Fox and Hanbury, Cowp. 445.



by one of the partners after the bankruptcy of another; the assignee cannot remove the same, but must join with the assignee of the other.

To set aside a bill brought by a partner, the defendant may plead the bankruptcy, and the assignment of the estate of one of them; and this was distinguished from cases in which a bill might have been allowed to stand, but this being a new remedy, which is confined to the assignee.

A bill of exchange of bankruptcy by one partner is known to the other, and is not the act of the other, and the assignee is not bound to pay it. But if the partner is a partner in the bill, and the bill is not the act of the assignee, the assignee is bound to pay it. The assignee is not bound to pay a bill which is not the act of the assignee, and the assignee is not bound to pay a bill which is not the act of the assignee.



## A D D E N D A.

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SINCE this work was printed, the Term Reports of last Easter term have been published, containing the following cases.

*Gordon and Wilkinson*, 8 T. R. 507.

A commission founded upon an act of bankruptcy by lying two months in prison, cannot be sued out before the expiration of the two months. The act is not completed before that time, and the affidavit to obtain it would be a perjury. (See above p. 60, 61.)

*Arding and Flower*, ib. 534.

A bankrupt attending, upon notice for that purpose, a meeting of the commissioners, to declare a dividend, is protected from arrest at the suit of a creditor, during such attendance, though several years after his last examination. This was determined upon general principles; considering the bankrupt in the character of a witness or party attending commissioners employed under the authority of an act of parliament, sitting in the nature of a court in the administration of justice.

The

## ADDENDA.

The bankrupt had verbal notice to attend, but no regular summons from the commissioners. The commissioners had, upon the arrest, caused it to be signified to the officer, that the bankrupt was attending them in the discharge of his duty, and that if he were detained the Lord Chancellor would on petition commit the officer, who therefore released him. Lord Kenyon held that the bankrupt must be taken to be attending by virtue of the commissioners authority, for he received the usual notice to attend, and the commissioners afterwards adopted the act of the messenger.

FINIS.



# I N D E X.

## *ABATEMENT.*

	PAGE
1. At law - - - - -	428
2. In equity - - - - -	437

### *Act of bankruptcy.*

General definition - - - - -	29
I. Of acts of bankruptcy, generally - - - - -	62
1. Of their locality - - - - -	ibid.
2. The time in relation to the trading - - - - -	ibid.
3. Of concerted acts - - - - -	63
4. Of purging an act of bankruptcy - - - - -	64
5. Construction of the statutes, generally - - - - -	ibid.
II. Of particular acts - - - - -	31
1. Such as relate to the trader's Person - - - - -	ibid.
1. Departing the realm - - - - -	ibid.
2. Departing from the dwelling-house - - - - -	33
3. Beginning to keep house - - - - -	35
4. Otherwise absenting himself - - - - -	38
5. Procuring protections - - - - -	ibid.
6. Exhibiting bills, &c. against creditors for longer time, or to force to composition - - - - -	39
7. Taking sanctuary - - - - -	ibid.
8. Fraudulent arrest, or yielding to prison - - - - -	ibid.
I i	9. Fraudulent

# I N D E X.

	PAGE
9. Fraudulent outlawry	40
10. Escape from prison, upon arrest for 100 l.	ibid.
2. Such as relate to his Effects	41
1. Fraudulent attachment or sequestration	ibid.
2. ——— grant or conveyance	42. 453
1. Of his whole effects	45
1. Though valuable consideration	46
2. Though with a small exception	48
3. Though for creditors, if any excluded, or dissent	50
2. Of part	ibid.
3. Paying petitioning creditor more in the pound than others	57
3. Such as relate to his circumstances or credit	58
1. Lying in prison two months on arrest for debt	ibid.
1. Of the debt	ibid.
2. Of the time	59
2. Member of parliament not paying in two months after summons	61
<i>Actions.</i>	
I. By and against the Bankrupt	412
II. By Assignees	416
I. Under common commissions	ibid.
1. Form of Action, Pleading, &c.	ibid.
2. Evidence	421
1. To support or defeat commission	ibid.
2. Of Creditors	423
3. Of the Bankrupt, or his declarations	424
1. To property	ibid.
2. To Acts of bankruptcy	425
3. To support the Commission	426
4. The depositions and proceedings	ibid.
3. Of continuing suits begun before the bankruptcy.	
See Abatement.	
II. Under commissions against partners.	

*Affidavit.*

# INDEX.

	PAGE
<i>Affidavit.</i>	
Of creditor suing out commission	67
<i>Agreements.</i> See <i>Proof of Debts.</i>	
<i>Aliens</i>	8
<i>Allowance of bankrupt.</i>	
1. Under separate commission	407
2. — joint ———	475
<i>Allowance of certificate.</i> See <i>Certificate.</i>	
<i>Annuities</i>	92
<i>Answer.</i> See <i>Examination.</i>	
<i>Apprentice</i>	94
<i>Award, debt on</i>	95
<i>Arrest.</i> See <i>Act of bankruptcy and Examination.</i>	
<i>Assignees.</i>	
1. Provisional assignees	162
2. Assignees chosen	163
3. Powers and duties of assignees	164
1. Under the statute	ibid.
2. As trustees generally	165
4. Nature of the interest that vests in assignees. See <i>Assignment.</i>	
5. How sue, and are sued. See <i>Actions.</i>	
<i>Assignment.</i>	
Form of it generally, and circumstances subsidiary to carrying it into effect in particular cases	168
<i>Effect of it</i>	173
I. In respect of the different kinds of property, and of the nature and extent of interest vesting in assignees	ibid.
1. Different kinds of property, assignable or not	ibid.
1. Generally	ibid.
2. Particularly	174
1. Things in action	175
2. Contingent interests or Possibilities	178
3. Offices, &c.	179
4. Things under restraint of alienation	181
5. Things	



# I N D E X.

	PAGE
5. Things in Joint tenancy - -	183
6. Property of the wife - -	184
7. Trust property - -	ibid.
8. Property situate in other countries -	ibid.
2. Nature and Extent of the interest that vests in them	185
1. In property in the bankrupt in his Own right	186
1. Generally - - -	ibid.
2. In cases of Set-off 192, and herein of the mutuality of debts in respect of	
1. Their natures and considerations -	195
2. The times of their accruing -	197
3. The parties - - -	202
3. In certain cases of Lien - -	207
Tradesman, Banker, Factor, &c.	
2. In property which he had in the right of Others	215
1. As husband - - -	ibid.
2. As trustee generally - -	221
3. As Executor or Administrator -	ibid.
4. As Factor - - -	222
II. In respect to the Time of the act of Bankruptcy -	229
1. With respect to dispositions of property made <i>after</i> the Act of bankruptcy - -	232
1. By acts in Pais; as sales, deeds, &c. -	232
and herein of	
1. Receipt of debts without - -	234
2. Payments in the course of trade -	ibid.
3. Purchasers without notice, and no commission in five years - - -	239
2. By acts of Law - - -	241
1. Judgements, Executions, &c. -	242
2. Attachments of property abroad -	243
3. Extents of the crown - - -	249
2. With respect to dispositions of property, where the act of bankruptcy <i>Intervenes</i> in some part of the transaction - - -	252
1. Generally	

# INDEX.

	PAGE
1. Generally	253
2. With respect to Acts merely of conveying the legal estate	254
3. As to Property delivered before, but not Accepted till after	255
4. Property stopped <i>in transitu</i>	259
3. With respect to property coming to the bankrupt after his bankruptcy	271
III. In respect of dispositions of property, by <i>Fraud</i>	277
1. In contemplation of bankruptcy	278
2. Provisions for Wife and Children, conveyances in trust, &c.	281
3. Fraudulent extent of the Crown	285
4. Possession as reputed owner	286
1. Of property originally the bankrupt's	294
1. Things capable of delivery	297
2. Things capable of a qualified delivery only	302
3. Things incapable of delivery, Choses in action	306
2. Of property not originally his	311
Effect of <i>Assignment</i> under commissions against Partners	455
<i>Attachment.</i> See <i>Act of Bankruptcy</i> and <i>Assignment</i> .	
<i>Bail</i> See <i>Sureties</i> and <i>Certificate</i> .	
<i>Bankrupt.</i>	
Persons who may be bankrupt.	
I. The Person	7, 8
1. Place of birth	8
2. Station or privilege	ibid.
II. The Trade. See <i>Trade</i> .	
III. The Capacity of contracting debts	26
1. Infants	ibid.
2. Females covert	ibid.
3. Clergymen	28
<i>Bills of Exchange</i>	96. 147. 189. 225
<i>Bond</i>	103
<i>Bottomree</i>	115

# I N D E X.

	PAGE
<i>Brickmaker</i>	15
<i>Brokers</i>	10. 12. 197. 202. 213, 214
<i>Certificate</i>	371
I. Of signing it	373
1. By the Creditors	ibid.
2. By the Commissioners	374
II. Of its allowance and confirmation	376
III. Circumstances which avoid it, or defeat its operation	380
1. Exceptions given by Statute	ibid.
1. Fraud in obtaining	ibid.
1. Creditors signing it for money	ibid.
2. Creditors consenting to its being signed, for money	381
2. Creditors signing it, on fictitious debts	ibid.
2. Misconduct	384
1. Under the commission	ibid.
Concealment	ibid.
2. As a trader, before it	ibid.
1. Giving above 100 l. with a child, in marriage	ibid.
2. Gaming	385
2. Upon grounds independent of statute	386
1. Want of certificate under a former commission	ibid.
2. A new promise	ibid.
IV. Of the Effect of the Certificate	388
1. As to the kind of demands discharged by it	ibid.
2. As it respects the person, or the effects; or both	393
3. Foreign discharges here, and English certificates abroad	396
V. How bankrupt may avail himself of Certificate	398
1. By Plea	399
2. By Motion	401
<i>Certificate under a joint commission</i>	474
<i>Claims</i>	159
<i>Clergyman</i>	28. 222
	<i>Commission.</i>



# I N D E X.

	PAGE
<i>Commission.</i>	
I. Against common persons	67
I. Suing out, 67. and herein of	
The Petitioning creditor's debt	ibid.
1. Its amount	69
2. Nature and ground	70
3. Time when contracted	72
1. In respect of the trading	ibid.
2. ——— the act of bankruptcy	73
3. ——— statute of limitations	76
II. Opening	77
1. Declaring the party bankrupt	ibid.
2. Seizure of property	78
3. Effect of death	80
IV. Superfeding	440
V. Renewing	444
II. Against Partners	451
I. Suing out	ibid.
II. Opening	ibid.
1. Act of bankruptcy	453
2. Petitioning creditor	ibid.
3. Party's death	454
<i>Commissioners.</i> See <i>Examination</i> and <i>Suits in equity</i> .	
<i>Commitment.</i> See <i>Examination</i> (powers of commissioners).	
<i>Concealment.</i> See <i>Examination</i> .	
<i>Contempt.</i> See <i>Examination</i> .	
<i>Contingent debts</i>	82—88
<i>Copyhold.</i> See <i>Assignment</i> (form of).	
<i>Costs.</i>	
1. Under the commission	446
2. In Suits and other proceedings	448
See also <i>Proof of debts</i> .	
<i>Covenant</i> , 107, and see <i>Certificate</i> (effect of).	
<i>Creditor petitioning.</i> See <i>Commission</i> (suing out).	
<i>Damages</i>	110

# I N D E X.

	PAGE
<i>Death of bankrupt</i> - - -	80. 454
<i>Debts.</i> See <i>Proof of debts.</i>	
<i>Declaration of bankruptcy.</i> See <i>Commission</i> (opening).	
<i>Deed.</i> See <i>Act of bankruptcy</i> (fraudulent conveyance), and <i>Assignment</i> (effect of, in cases of fraud).	
<i>Denial.</i> See <i>Act of bankruptcy</i> (beginning to keep house).	
<i>Denizen</i> - - -	8
<i>Departing the Realm.</i> See <i>Act of bankruptcy.</i>	
<i>Departing from the dwelling house.</i> See <i>ibid.</i>	
<i>Depositions.</i> See <i>Actions</i> (evidence) and <i>Proof of debts</i> (conditions and manner of proof).	
<i>Discharge.</i> See <i>Certificate.</i>	
<i>Distress.</i> See <i>Proof of debts</i> (rent).	
<i>Dividend</i> - - -	403
<i>Docket</i> - - -	67
<i>Drover</i> - - -	13, 14
<i>Election.</i> See <i>Proof of debts</i> (conditions and manner of proof); and same Title (under commissions against Partners).	
<i>Enrollment.</i> See <i>Assignment</i> (form, &c. of).	
<i>Escape.</i> See <i>Act of bankruptcy.</i>	
<i>Evidence.</i> See <i>Actions</i> (evidence).	
<i>Examination.</i>	
I. The Persons liable to be examined - - -	324
1. The bankrupt - - -	ibid.
2. The wife - - -	ibid.
3. Others - - -	325
II. Form and manner of the Examination 325, and herein of	
1. The oath - - -	ibid.
2. Question, verbal or written - - -	326
3. The subscription - - -	327
III. The Subjects of examination - - -	328
1. With respect to the bankrupt - - -	ibid.
2. With respect to others - - -	330
3. With respect to both - - -	332
IV. Provisions	

# I N D E X.

	PAGE
IV. Provisions for enabling and facilitating discovery	338
1. Time allowed for surrender	339
2. Privilege from arrest	344
3. Access to books and papers	351
4. Must attend assignees	352
5. May be examined in prison	ibid.
V. Powers of commissioners in cases of non-conformity	354
1. Nature of their authority, generally	355
2. Powers of commitment in particular cases	358
1. For Non-attendance	ibid.
2. For not fully answering	360
3. For Misbehaviour	365
3. Form of the Commitment	ibid.
VI. Proceedings at law, for non-conformity	368
<i>Exchequer</i> , circulating bills of	21
<i>Excise</i>	21. 51
<i>Execution</i>	42. 242. 419, 420
<i>Executor</i> . See <i>Assignment</i> and <i>Proof of debts</i> .	
<i>Extent</i>	249. 285
<i>Factor</i> . See <i>Assignment</i> and <i>Trade</i> .	
<i>Farmer</i>	13
<i>Feme covert</i>	26, 27
<i>Gaming</i> . See <i>Certificate</i>	26
<i>Infants</i>	ibid.
<i>Innkeeper</i>	20
<i>Insurance</i>	115
<i>Interest</i>	116. 410
<i>Judgments</i>	119. 242
<i>Last Examination</i> . See <i>Examination</i> .	
<i>Lien</i> . See <i>Assignment</i> .	
<i>Mortgage</i>	118. 147. 187
<i>Partners</i> , commissions against	451
<i>Payments</i> in course of trade. See <i>Assignment</i> (effect of in respect to the time of the act of bankruptcy).	

*Pleading*



# I N D E X.

	PAGE
<i>Pleading</i>	416
<i>Pledge.</i> See <i>Mortgage.</i>	
<i>Possession</i> as reputed Owner, 286. See <i>Assignment</i> (effect of, in cases of Fraud).	
<i>Privilege from Arrest.</i> See <i>Examination.</i>	
<i>Proof of debts.</i>	
I. Under common commissions	82
I. Of debts generally	ibid.
1. The time at which a debt said to accrue	ibid.
2. The certainty of its amount	87
3. Its consideration	89
II. Particular debts 91, are arranged in the Work, alphabetically.	
III. Conditions and manner of proof	139
1. Time of proving	ibid.
2. Kind of proof	140
3. In whose person made	142
4. Creditor having a security	144
5. Creditor proceeding at law	148
6. Creditor having benefit of another's proof	155
7. Reduction of proofs	158
8. Claims	159
II. Under commissions against Partners	459
1. Separate debts	ibid.
2. Joint debts	463
3. Joint and several	467
4. Proofs by partners, or in right of partners	468
5. Accounts of the respective estates and proofs	470
6. Set-off	471
7. Creditor proceeding at law	472
<i>Relation</i> of the act of bankruptcy	60. 229
<i>Rent</i>	123
<i>Scrivener.</i> See <i>Trade.</i>	

*Seizure*

# INDEX.

	PAGE
<i>Seizure of bankrupt's effects</i>	78
<i>Set-off.</i>	192. 471
<i>Schoolmaster</i>	21
<i>Sheriff</i>	419
<i>Smuggler</i>	24. 335
<i>Solicitor</i>	71. 213. 447
<i>Stopping in transitu</i>	259
<i>Suits in equity</i>	164. 431
I. Of the Jurisdiction	431
1. Of the Commissioners	ibid.
2. Of the Great Seal	432
II. Of suits by and against Assignees	434
III. Of Suits begun before bankruptcy	437
<i>Superjeding commissions</i>	440
<i>Surrender of bankrupt. See Examination.</i>	
<i>Surety. See Proof of debts.</i>	
<i>Surplus of bankrupt's effects</i>	409
<i>Trade</i>	9
The Requisites to constitute a trading	ibid.
I. Credit upon an uncertain capital	ibid.
1. Buying and selling moveable chattels	10
1. Generally—Merchant, grocer, &c.	ibid.
2. Bankers, brokers, factors, scriveners, exchange-brokers, &c.	10, 11, 12
2. Buying materials and selling them manufactured	12
3. Labourers, 13. Not liable to bankrupt laws.	
4. Land owners, ibid. Not liable. Farmer, grazier, drover, ibid. Coal-mines, alum-rocks, &c.	14.
Brickmaker	15
5. Land-jobbers, 17. Not liable.	
6. Buying and selling bank-stock, &c. ibid. Not liable.	
II. Repeated practice, and seeking a living, 18. Selling off stock, ibid. no trading. Nor drawing and re-	
drawing	

# I N D E X.

	PAGE
drawing bills for private occasions, <i>ibid.</i> Possession of a stock in trading companies, 19. <i>Qu.</i>	
III. General way of merchandize - - -	20
Innkeeper, victualler, schoolmaster, &c. 20, 21. no traders.	
Commissioners of navy, officers of excise, &c. futlers, stewards of inns of court, &c. no traders, 21: nor receivers of the king's taxes, nor persons circulating exchequer bills - - -	ibid.
IV. In party's own right - - -	ibid.
Circumstances not requisite - - -	23
1. Principal means of living - - -	ibid.
2. Gaining by the trade - - -	24
3. Legal trade - - -	ibid.
4. Trading in England - - -	ibid.
5. Residing in England - - -	ibid.
6. Keeping open shop - - -	25
<i>Trover.</i> See <i>Actions.</i>	
<i>Trustee.</i> See <i>Assignment.</i>	
<i>Victualler</i> - - -	21. 23
<i>Voluntary deeds.</i> See <i>Assignment</i> (Effect of, in cases of fraud).	
<i>Usury</i> - - -	89
<i>Wife</i> , Examination of - - -	324. 331
—, Property of - - -	184. 215
—, Debts of - - -	115
<i>Witness.</i> See <i>Actions</i> (by and against Assignees).	

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